

[Supreme Court of Pakistan]

**Present: Irshad Hasan Khan, C. J., Muhammad Bashir Jehangiri, Abdur Rehman Khan,**

**Sh. Riaz Ahmed, Ch. Muhammad Arif, Munir A. Sheikh, Rashid Aziz Khan, Nazim Hussain Siddiqui, Iftikhar Muhammad Chaudhry, Qazi Muhammad Farooq and Rana Bhagwan Das, JJ**

**WASIM SAJJAD and others---Petitioners**

**versus**

**FEDERATION OF PAKISTAN through Secretary, Cabinet Division and others---Respondents**

Civil Review Petitions Nos.208 of 2000 in Constitutional Petition No.63 of 1999, Civil Review Petition No.209 of 2000 in Constitutional Petition No.62 of 1999, Civil Review Petition No.210 of 2000 in Constitutional Petition No.62 of 1999 alongwith Civil Miscellaneous Applications Nos.1113 and 1119 of 2000 in Civil Review Petition No.208 of 2000, decided on 7th February, 2001.

(On review of judgment dated 12-5-2000/29-5-2000 passed by this Court in Constitution Petitions Nos.62/99, 63/99, 53/99, 57/99, 3/2000, 66/99 and 64/99).

**(a) Provisional Constitution Order (1 of 1999)---**

---Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra? constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Precedents from foreign jurisdictions---?Applicability ---Precedents from. foreign jurisdictions, though entitled to reverence and respect but were not ipso facto applicable to the facts and circumstances prevailing on the day of taking over by the Armed Forces.

**(b) Provisional Constitution Order (1 of 1999)---**

---Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra? constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Doctrine of State necessity---Applicability---To save and maintain the integrity, sovereignty and stability of the country and having regard to the welfare of the people while interpreting the legislative instruments i.e. Provisional Constitution Order, 1999 and Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999, Court had to make every attempt to save "what institutional values remained to be saved with a view to maintaining and upholding the independence of Judiciary which, in turn, would protect the State fabric and guarantee Human/Fundamental Rights---Theory of State necessity would arise only if an act which would otherwise be illegal becomes legal if it is done bona fide in view of State necessity---Doctrine of State necessity had not been rejected in the judgment of Supreme Court in Liaquat Hussain v. Federation of Pakistan PLD 1999 SC 504---Prerequisites of doctrine of State necessity stated.

**(c) Provisional Constitution Order (1 of 1999)---**

---Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra? constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Factors---Validity---Doctrine of State necessity ---Application---?Court faced extra-constitutional situation and all the elements viz. inevitable necessity; exceptional circumstances; no other remedy to apply, measures taken being proportionate to the necessity and of temporary character, limited to the duration of exceptional circumstances, were present, inasmuch as, the Constitution provided no solution to meet the extraordinary situation prevailing 'on 12th October, 1999 when the Armed Forces took over the affairs of Pakistan.

**(d) State necessity, doctrine of---**

---Applicability---Elements---Inevitable necessity; exceptional circum?stances; no other remedy to apply; measures taken being proportionate to the necessity and of temporary character, limited to the duration of exceptional circumstances, were the elements for application of the doctrine.

**(e) Constitution of Pakistan (1973)---**

---Art.188---Supreme Court Rules, 1980, O.XXVI, R.1---Review of Supreme Court judgment---If nothing had been overlooked by the Supreme Court nor the Court had failed to consider any important aspect of the matter, review petition would not sustain.

**(f) Provisional Constitution Order (1 of 1999)---**

---Preamble---Constitution of Pakistan (1973), Art. 2A---Extra?constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Revolutionary political change was not in derogation of the Objectives Resolution under Art.2A of the Constitution.

**(g) Constitution of Pakistan (1973)---**

---Art.188---Supreme Court Rules, 1980, O.XXVI, R.1---Review of Supreme Court judgment ---Reagitation of the same issues through review petition was beyond the scope of review.

**(h) Constitution of Pakistan (1973)---**

---Art.188---Supreme Court ,Rules, 1980, O.XXVI, R.1-.,Review of Supreme Court judgment---Raising of factual controversies would amount to rearguing the same cause which was not permissible under law.

**(i) Provisional Constitution Order (1 of 1999)---**

---Preamble---Constitution of Pakistan (1973), Art. 184(3)---Extra? constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Collapse of economy of the country was not the only ground for intervention of the Armed

Forces, as a matter of fact, the material relied upon and remarks made by the Supreme Court were in response to the assertions made by the parties in their petitions.

#### **(j) Provisional Constitution Order (1 of 1999)---**

---Preamble---Constitution of Pakistan (1973), Arts. 188, 184(3) & 91(4)---?Supreme Court Rules, 1980, O.XXVI, R.1---Review of Supreme Court judgment---Principle of joint and ministerial responsibility in Parliamentary System---Contention was that in a parliamentary system, the principle of joint ministerial responsibility was applied to the cabinet, inasmuch as every minister, whether he agreed to a particular decision of the Cabinet or not, must own such decision---Validity---Such principle could not be extended to the members of the Parliament, as the function of the Parliament was not merely to remove the Government but also to legislate and carry out accountability of the Government through Parliamentary Committees in accordance with the procedure where questions were asked and adjournment motions introduced---Accountability by Court, however, was also an on going exercise.

Begum Nusrat Bhutto v. Chief of the Army Staff and Federation of Pakistan PLD 1977 SC 657; Sh. Liaqat Hussain v. Federation of Pakistan PLD 1999 SC 504; Mehmood Khan Achakzai v. Federation of Pakistan PLD 1997 SC 426; Constitutional and Administrative Law by Barnett; Disenchantment with Parliamentary Democracy by A.K. Brohi, published in PLD 1977 Jour. 81; Pakistan Fisheries Ltd., Karachi v.: United Bank Ltd. PLD 1993 SC 109; Trustees of the Port of Karachi v. Muhammad Saleem 1994 SCMR 2213; Dr. Muhammad Iqbal v. Haji Muhammad Akram PLD 1991 Lah. 8; Syed Ghayyur Hussain Shah v. Gharib Alam PLD 1990 Lah. 432; Mian Rafiq Saigol and another v. Bank of Credit and Commerce International (Overseas) Ltd. and another PLD 1997 SC 865; Mohtarma Benazir Bhutto v. President of Pakistan PLD 1998 SC 388; State of Emergency; The Indian Experience by Venkat Iyer; State of Maharashtra v. Ramdas Shrinivas Nayak AIR 1982 SC 1249 = 1982 Cr.LJ 1581; The Superintendent, Land Customs, Torkham (Khyber Agency) v. Zewar Khan and 2 others PLD 1969 SC 485; Dawarkadas and another v. The State PLD 1957 SC (Pak.) 72; Federation of Pakistan v. Muhammad Tariq Pirzada 1999 SCMR 2189; Abdul Ghaffar-Abdul Rehman v. Asghar Ali PLD 1998 SC 363; Kh. Ahmed Tariq Rahim PLD 1992 SC 646; Mian Muhammad Nawaz Sharif's case PLD 1993 SC 473; Benazir Bhutto's case PLD 1998 SC 388 and Federation of Pakistan v. Shaukat Ali Mian PLD 1999 SC 1026 ref.

#### **(k) Provisional Constitution Order (1 of 1999)---**

---Preamble---Oath of Office of (Judges) Order (1 of 2000), Preamble--?Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Extra-constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Action of taking over the affairs of Pakistan by the Armed Forces qualifies for validation on the ground of state necessity/survival---Status of the Government was de facto but in view of the validation it has attained the status of a de jure government---Representatives of the people were to see to it that everything was in order and no body could raise his little finger when their actions were in line with the fundamentals of the Constitution---No rule except that by the representatives of the people within contemplation of the Constitution and the law has the support of the superior Judiciary which is firmly committed to the governance of the country by the peoples' representatives according to the definition of the term "democracy" to the effect that "it is Government of the people, by the people and for the people" and not by the Army rule for an indefinite period---Validation and legitimacy accorded to the Government by the Supreme Court is conditional, and interlinked with the holding of general elections to the National Assembly and the Provincial Assemblies and the Senate of Pakistan within the time frame laid down by the Supreme Court leading to restoration of the democratic institutions---Pakistan must have democracy and any obstacles in respect of achieving that goal must be overcome---Chief Executive/Armed Forces have no power to amend the salient features of the Constitution (1973) relating to independence of judiciary, federalism and parliamentary form of Government blended with Islamic provisions---Legitimacy conferred on the Regime, on the touchstone of the doctrine of state necessity/state survival, does not imply abdication of the power of judicial review in the transient suspension of the previous legal order ---Constitution of Pakistan (1973) still remains the supreme law of the land subject to the condition that certain parts thereof have been held in abeyance on account of state necessity/state survival---Notwithstanding the purported ouster of jurisdiction of all the Courts to challenge any action, order or law promulgated by the Chief Executive, every action of the Chief Executive/Armed Forces is open to judicial review through appropriate writs/petitions in line with the principles laid down in the Supreme Court judgment in Syed Zafar Ali Shah v. General Pervaiz Musharraf, Chief Executive of Pakistan PLD 2000 SC 869---Fundamental Rights are intact and justiciable ---Supreme Court observed that prolonged involvement of the Army in civil affairs runs a grave risk of politicising it, which would not be in the national interest, therefore, civilian rule in the country must be restored within the shortest possible time after achieving the declared objectives which necessitated the military take-over, as spelt out in the speeches of the Chief Executive dated 13th and 17th October, 1999---Chief Executive has been allowed by the Supreme Court three years period with effect from the date of the Military take-over (12th October, 1999) for achieving his declared objectives and to appoint a date, not later than 90 days before the expiry of the aforesaid period of three years for holding general elections to the National Assembly and Provincial Assemblies and the Senate of Pakistan---Positive assurance has also been reaffirmed by the Chief Executive in respect of holding of general elections within the time frame laid down by Supreme Court for restoration of democratic institutions.

The Chief Executive/Armed Forces have no power to amend the salient features of the Constitution relating to independence of judiciary, federalism and parliamentary form of Government blended with Islamic provisions. Prolonged involvement of the Army in civil affairs runs a grave risk of politicising it, which would not be in the national interest, therefore, civilian rule in the country must be restored within the shortest possible time after achieving the declared objectives which necessitated the Military Takeover, as spelt out in the speeches of the Chief Executive, dated 13th and 17th October, 1999. The legitimacy conferred on the present Regime, on the touchstone of the doctrine of state necessity/state survival, does not imply abdication of the power of judicial review in the transient suspension of the previous legal order. Constitution of 1973 still remains the supreme law of the land subject to the condition that certain parts thereof have been held in abeyance on account of state necessity/state survival. The result is that notwithstanding the purported ouster of jurisdiction of all the Courts in Pakistan to challenge any action, order or law promulgated by the Chief Executive, every action of the Chief Executive/Armed Forces is open to judicial review through appropriate writs/petitions in line with the principles laid down in the judgment (Syed Zafar Ali Shah v. General Pervaiz Musharraf, Chief Executive of Pakistan PLD 2000 SC 869). Similarly, the Fundamental Rights were also intact and justiciable.

The action of 12th October, 1999 being what it is, qualifies for validation on the ground of state necessity/survival. It is - for the representatives of the people to see to it that everything is in order and nobody can raise his little finger when their actions are in line with the fundamentals of the Constitution. No rule except that by the representatives of the people within the contemplation of the Constitution and the law has the support of the Superior Judiciary. Judiciary is firmly committed to the governance of the country by the peoples' representatives and Supreme Court reiterated the definition of the term 'democracy' to the effect that "it is Government of the people, by the people and for the people." and not by the Army rule for an indefinite period.

Though initially the status of the present Government was de facto, but in view of the validation it has attained the status of a de jure Government. The validation and legitimacy accorded to the present Government is conditional and interlinked with the holding of general elections to the National Assembly, the Provincial Assemblies and the Senate of Pakistan within the time frame laid down by the Supreme Court leading to restoration of the democratic institutions.

No one could disagree that Pakistan must have democracy and any obstacles in respect of achieving that goal must be overcome.

Pakistan has a chequered political history ever since it attained its legal birth and freedom with the adoption of Government of India Act, 1935 ' as an interim Constitution along with the Indian Independence Act, 1947. Unfortunately as it is, after the demise of Quaid-e-Azam Muhammad Ali Jinnah, there has been a political vacuum in the country and malfunctioning of the institutions giving rise to military intervention in the civil affairs of the country time and again. Irrespective of the causes for, military intervention, its prolonged involvement in the civil affairs will not only politicise it but would also affect its professionalism in defending the borders of Pakistan. Such a course can never be countenanced by Supreme Court. Positive assurance has been made by the Chief Executive in respect of holding of general elections within the time frame laid down by Supreme Court for restoration of democratic institutions.

Supreme Court also reaffirmed by way of emphasis that the validation and legitimacy accorded to the present Government is conditional, interlinked and intertwined with the holding of general elections to the National Assembly and the Provincial Assemblies and the Senate of Pakistan within the time frame laid down by Supreme Court leading to restoration of the democratic institutions. .

Since the Chief Executive was claiming in the Oath of Office (Judges) Order, 2000 (Order No. 1 of 2000), legislative power to amend the Constitution, in the absence of appropriate representative institutions, it was the duty of Supreme Court to place checks on it. After considering all the attending circumstances, limited powers of amendment were conferred as highlighted in the judgment under review and reaffirmed in the Short Order dated 7-2-2001.

The matter was heard for months together in which over twenty-five Advocates of Supreme Court including Senior Advocates and amicus curiae addressed the Court. The judgment under review was rendered after threadbare consideration of each and every aspect of the matter, the case-law' cited at the Bar as also the pleadings of the parties vide reasons assigned in paragraphs No. 221 to 287, which did not suffer from any error or flaw whatsoever warranting interference.

#### **(l) Accountability---**

---- Accountability is an ongoing process and the same shall continue with a view to completing it even by the successive Governments.

#### **(m) Provisional Constitution Order (1 of 1999)---**

---Preamble---Oath of Office of (Judges) Order (1 of 2000), Preamble--?Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art. 188---Supreme Court Rules, 1980, O.XXVI, R.1---Review of Supreme Court judgment---Extra? constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---No glaring omission or patent mistake floating on the surface in the judgment under review was found---Nothing had been overlooked by the Court nor the Court had failed to consider any aspect of the attending matters---In situation prevailing on or before the take-over of affairs of the country by the Armed Forces for which the Constitution provided no solution, the Armed Forces had to intervene to save the State from further chaos, and for maintenance of peace and order, economic stability, justice, good governance and to safeguard the integrity and sovereignty. of the country dictated by the highest considerations of state. necessity and welfare of the people---Argument advanced by the petitioners was that none of the alleged grievances against the removed government, including the charges of corruption and lack of good governance, was such. which could not have been redressed within the four corners of the Constitution because laws and machinery to redress such grievances were already in existence and, if as alleged, the Government of the day did not take appropriate steps, it was open to the Supreme Court to direct the taking of specific steps in exercise of the powers under Art.184(3) read with Art.187 of the Constitution, therefore 'observations of Supreme Court that law of necessity could validly be invoked to suspend the Constitution as it had no answer to the situation that had arisen, needed to be reviewed ?Argument advanced having also been raised at the time of judgment under review and repelled, petitioners could not be allowed to re-argue the same in proceedings of review of the said judgment---Petitioners could not be permitted to seek reversal of conclusions earlier reached by the Supreme Court after full application of mind deliberatively and consciously in the judgment sought to be reviewed.

#### **(n) Provisional Constitution Order (1 of 1999)---**

---Preamble---Oath of Office of (Judges) Order (1 of 2000), Preamble--?Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.188---Supreme Court Rules, 1980, O.XXVI, R.1---Review of Supreme Court judgment---Extra-constitutional step of taking over the affairs of Pakistan by the Armed Forces---Validity---Rampant corruption was only a cumulative. reason for the validation of action of take-over by the Armed Forces which resulted into the suspension of Assemblies and removal of the Government as succinctly explained in the judgment under review.

#### **(o) Provisional Constitution Order (1 of 1999)---**

---Preamble---Oath of Office of (Judges) Order (1 of 2000), Preamble--?Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art. 188---Supreme Court Rules, 1980, O.XXVI, R.1---Review of Supreme Court judgment ---Extra ?constitutional step of taking over the affairs of Pakistan by the Armed Forces---Validity---Collapse of economy was not the only ground for intervention of Armed Forces; as a matter of fact the material relied upon and remarks made by the Court were in response to the assertions made by the petitioners in their original petitions in the case under review.

#### **(p) Provisional Constitution Order (1 of 1999)---**

---Preamble---Oath of Office of (Judges) Order (1 of 2000), Preamble--?Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art. 188---Supreme Court Rules, 1980, O.XXVI, R.1---Review of Supreme Court judgment---Extra? constitutional step of taking over the affairs of Pakistan by the Armed Forces---Validity---When the country was faced with a grave crisis, the constitutional maintenance demanded that the Court interpreted the Proclamation of Emergency and Provisional Constitution Order, 1999 in such a way as to authorise whatever powers and measures were necessary to cope with the emergency as the Supreme Court could not be expected to do the impossible.

#### **(q) Provisional Constitution Order (1 of 1999)---**

---Preamble---Oath of Office of (Judges) Order (1 of 2000), Preamble--?Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973),- Art.188---Supreme Court Rules, 1980, O.XXVI, R.1---Review of Supreme Court judgment ---Extra?constitutional step of taking over the affairs of Pakistan by the Armed Forces---Validity---Powers of Chief Executive to amend the Constitution--?Extent---Power to amend the Constitution cannot be conferred on the Chief Executive of the measure larger than that which could be exercised by the Parliament---Chief Executive was allowed to amend the Constitution subject to stated limitations/conditions for the ordinary orderly running of affairs of the State during the transitory period to advance or promote the good of the people---Constitutional amendments by the Chief Executive could be resorted to only if the Constitution failed to provide a solution for attainment of his declared Objectives.

#### **(r) Constitution of Pakistan (1973)---**

---Art. 188---Supreme Court Rules, 1980, O.XXVI, R.1---Review of Supreme Court judgment---Conditions---Where there was no error on the face of the record warranting review, the petitioners could not be allowed under the law to re-agitate the same points which had already been heard and decided by the Court---Factual controversies could not be raised and fresh material which had been filed with the review petitions which existed even prior to the filing of original case and no reason had been advanced as to why the same was not produced with the former or during the course of hearing of the same, could not be considered by the Court unless strong reasons were mentioned for its non-production at the relevant time---Fresh documents, in any event, would have no bearing on the conclusion. already recorded in the judgment under review.

#### **(s) Provisional Constitution Order (1 of 1999)---**

---Preamble---Constitution of Pakistan (1973), Arts. 188 & 184(3)---Review of Supreme Court judgment---Extra-constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Legislative instruments promulgated by the Chief Executive were subject to scrutiny by Supreme Court.

#### **(t) Provisional Constitution Order (1 of 1999)---**

---Preamble---Oath of Office of (Judges) Order (1 of 2000), Art.3---?Constitution of Pakistan (1973), Arts.188, 184(3) & 199---Supreme Court Rules, 1980, O.XXVI, R.1---Review of Supreme Court judgment ---Extra-constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Judicial review---Scope---No form of oath taken by or administered to the Judges of the superior Courts could restrict the judicial power and derogate from the legal position that the Courts; as final arbiters in any constitutional controversy, retain their power and jurisdiction to say as to what a particular provision of the Constitution or the law meant, or did not mean even if that particular provision was one seeking to oust jurisdiction of the Court.

#### **(u) Constitution of Pakistan (1973)---**

---Arts.2A & 175---Independence of judiciary---Objectives Resolution and Declaration of Quaid-i-Azam about democratic set-up and social justice envisage independence of judiciary.

#### **(v) Constitution of Pakistan (1973)---**

---Arts.2A & 175---Judiciary is entrusted with the responsibility for enforcement of Fundamental Rights.

#### **(w) Constitution of Pakistan (1973)---**

---Arts.2A & 175---Exclusive power/responsibility of the Judiciary to ensure the sustenance of system of separation of powers based on checks and balances.

#### **(x) Provisional Constitution Order (1 of 1999)---**

---Preamble---Oath of Office .of (Judges). Order (1 of 2000), Art.3---?Constitution of Pakistan (1973), Arts. 188, 184 & 199---Extra-constitutional step of taking over the affairs of Pakistan- by the Armed Forces of Pakistan---Validity---Judicial review---Scope---Contention that after new oath of Judges under Art.3, Oath of Office of (Judges) Order, 2000, the Judges were bound to defend the Provisional Constitution Order, 1999 was repelled in the light of Begum Nusrat Bhutto's .case PLD 1977 SC 657 wherein it was clearly stated that on no principle of necessity could the power of judicial review be taken away.

#### **(y) Provisional Constitution Order (1 of 1999)---**

---Preamble---Oath of Office of (Judges) Order (1 of 2000), Art.3---?Constitution of Pakistan (1973), Arts. 184 & 199---Extra-constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---?Validity---Judicial review---Scope---Superior Courts retain the power of judicial review after the Army take-over---Evolution of judicial power was coterminous with the evolution of civilization and that was because judicial power had to check the arbitrary exercise of power by any organ or authority.

#### **(z) Provisional Constitution Order (1 of 1999)---**

---Preamble---Constitution of Pakistan (1973), Art. 184---Penal Code (XLV of 1860), 5.120-A---Extra-constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Factors---Removal of Chief of Army Staff during his absence from the country and appointment of another person as such was an attempt to create dissension among the Armed Forces, criminal conspiracy hatched by the Prime Minister and others.

#### **(aa) Provisional Constitution Order (1 of 1999)---**

---Preamble---Constitution of Pakistan (1973), Art. 184---Extra-constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Doctrine of state necessity and principle "salus populi suprema lex"---Applicability---Intervention of Armed Forces as such was validated by Supreme Court on the doctrine of state necessity and the principle "salus populi est suprema lex".

#### **(bb) Provisional Constitution Order (1 of 1999)---**

---Preamble---Constitution of Pakistan (1973), Art. 184---Extra-constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Doctrine of state necessity and principle of "salus populi est suprema lex"---Applicability---Allegation of corruption against the Prime Minister and his colleagues, disappearance of public faith in the integrity and honesty of the Government which eroded the constitutional and moral authority of the Government was a situation somewhat similar to the one prevalent in July, 1977.

#### **(cc) Provisional Constitution Order (1 of 1999)---**

---Preamble---Constitution of Pakistan (1973), Art. 184---Extra-constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Factor---Doctrine of state necessity and principle of "salus populi est suprema lex"---Applicability---Government was being run contrary to the provisions of the Constitution, the Armed Forces were compelled to move in as a, last resort to 'prevent any further destabilization.

#### **(dd) Provisional Constitution Order (1 of 1999)---**

---Preamble---Constitution???? of???????? Pakistan . (1973), ?????? Art. 184---Extra- constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Factor---Doctrine of state necessity and principle of "salus populi est suprema lex"---Applicability---Government having failed to, eradicate corruption from the society, corruption and absence of good governance were recognized grounds for imposition of Martial law---Corruption, however, by itself is a ground for imposition of Martial Law or Proclamation of Emergencies--- "Corruption" defined.

**(ee) Provisional Constitution Order (1 of 1999)---**

---Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra?constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Allegations of corruption etc. against parliamentarians or politicians or members from the general public---Proceedings commenced against all said persons were to be decided on their own merits in accordance with law and on the basis of the legally admissible material brought before the concerned fora in those proceedings and only after the finalisation of the said proceedings that the country will be geared up for resort to democratic principles and corruption-free "society which are pre?requisites for good governance.

**(ff) Provisional Constitution order (1 of 1.999)---**

---Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra?constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Factors---Validity---Misdeclaration of assets both before the Wealth Tax Authorities and the Election Commission and allegations of massive corruption and corrupt practices by the large number of politicians and parliamentarians by itself may not be a ground for intervention of the Armed Forces but such aspect of the matter, when viewed in the overall context and with particular reference to the alleged massive corruption and corrupt practices, becomes a relevant factor.

**(gg) Provisional Constitution Order (1 of 1999)---**

---Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra?constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Factors---Validity---Combined effect of the overall policies and methodology adopted by the former Government was the total collapse of the country's economy inasmuch as G. D. P. growth during the past three years had hardly kept pace with the growth of population and Pakistan had a debt burden which equalled the country's entire national income---Supreme Court also took judicial notice of the fact that the trade imbalance was persistent and due to defective economic policies and lack of economic discipline by the previous Government, the industrial sector had suffered a great set back.

**(hh) Provisional Constitution Order (1 of 1999)---**

---Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Cbnstitution of. Pakistan (1973), Art.184(3)---Extra?constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Factors---Validity---On the day when the Army took over and for years prior to that time there was merely a feigned appearance of what could be called a form of "oligarchy" which means a Government in which the authority constitutionally reposes in a few. individuals and families and a small coterie of individuals who, because of economic and other power, could influence measurably the policy of the Government ---Purposes for which the representative institutions were established stood defeated directly or indirectly---Supreme Court was thus faced with a situation not visualized by the Constitution.

**(ii) Provisional constitution Order (1 of 1999)---**

--Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Arts.184(3) & 91(4), (5)---Extra-constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Suspension of Assemblies and the Senate through extra-constitutional measures by the Chief of Army Staff--? Factors---Validity---Doctrine of state necessity---Applicability---Role of public representatives---Principle of joint and ministerial responsibility in Parliamentary system---Rest of the members of representative bodies cannot be absolved of their responsibility if, despite wrongdoings by the cabinet, they remained silent spectators---Suspension of the Assemblies and the Senate through extra-constitutional measures taken by the Chief of Army Staff, warranted validation on the ground of state necessity and state survival.

**(jj) Constitution of Pakistan (1973)---**

---Art.58(2)(b) [since repealed]---Dissolution of National Assembly--?Balance governing the powers of the President and the Prime Minister--?Never safe to confer unfettered powers on a person who was holding the reins of the affairs of the country as "power corrupts and absolute corrupts absolutely"---Situation could have been avoided if checks and balances governing the powers of the President and the Prime Minister had been in the field by means of Art.58(2)(b) of the Constitution of Pakistan (1973).

**(kk) Provisional Constitution Order (1 of 1999)---**

---Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Arts.184(3) & 63(2)--?Extra-constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Factors---Validity---Ridiculing the Judiciary and taping of telephones of Judges of superior Courts---Debates of Parliament of the relevant period clearly demonstrated that integrity and independence of the Judiciary of Pakistan were challenged by the Members of Parliament which had the effect of defaming and bringing the Judges into ridicule and disparaging remarks against the Judiciary crossed all limits and no Reference was made to the Chief Election Commissioner for their disqualification as Members of the Parliament under Art.63(2) of the Constitution of Pakistan (1973)---Such acts of taping the telephones of Judges of the superior Courts and maligning the Judiciary were most detestable, immoral, illegal and unconstitutional.

**(ll) Provisional Constitution Order (1 of 1999)---**

---Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra?constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Factors---Validity---Doctrine of State necessity--?Applicability---Machinery of the Government at the Centre and the Provinces had completely broken down and the Constitution had been rendered unworkable, and a situation had arisen for which the Constitution provided no solution and the Armed Forces had to intervene to save the state from further chaos, for maintenance of peace and order, economic stability, justice and good governance and to safeguard integrity and sovereignty of the country dictated by highest considerations of state necessity and welfare of the people.

**(mm) Provisional Constitution Order (1 of 1999)---**

---Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra?constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Doctrine of state necessity---Applicability---To save and maintain the integrity, sovereignty and stability of the country and having regard to the welfare of the people while interpreting the legislative instruments i.e. Provisional Constitution Order, 1999 and Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999, Court has to make every attempt to save "what institutional values remained to be saved" with a view to maintaining and upholding the independence of Judiciary which in turn would protect the state fabric and guarantee Human/Fundamental Rights---Doctrine of State necessity had not been rejected in the judgment of Supreme Court in Liaquat Hussain v. Federation of Pakistan PLD 1999 SC 504---Prerequisites of doctrine of state necessity stated.

#### **(nn) Provisional Constitution Order (1 of 1999)---**

---Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated. 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra?constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Factors---Validity---Doctrine of state necessity ---Application--?All the elements viz. inevitable necessity; exceptional circumstances; no other remedy to apply, measures taken being proportionate to the necessity and of temporary character limited to the duration of exceptional circumstances, were present, inasmuch as the Constitution provided no solution to meet the extraordinary situation prevailing on 12th October, 1999 when the Armed Forces took over the affairs of Pakistan.

#### **(oo) Provisional Constitution Order (1 of 1999)---**

---Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra?constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Doctrine of state necessity ---Applicability--?Intervention by the Armed Forces on 12th October, 1999 was an imperative and inevitable necessity in view of the exceptional circumstances prevailing at that time, and, therefore, there was no valid justification for not validating the extra-constitutional measure of the Armed Forces on the technical distinction between "doctrine of necessity" and the "doctrine of state necessity" which. in fact, was not material.

#### **? (pp) State necessity, doctrine of--?**

---Applicability---Principles.

Classics of International Law by Hugo Grotius quoted.

#### **(qq) Prerogative of the Crown---?**

---Relative duties and rights of the subject---Principles.

Treatise on the Law of the Prerogative of the Crown by Joseph Chitty ref.

#### **(rr) State necessity, doctrine of---**

---"Necessity"---Defined.

Corpus Juris Secundum ref.

#### **(ss) Constitution of Pakistan (1973)---**

---Art.232---Proclamation of Emergency---State of emergency--?Interpretation---State of emergency includes "regimes of exception" i.e. regimes which have overthrown and not merely suspended the previous constitutional order and have assumed legislative and executive powers analogous to those under a formal state of emergency---Government to take steps to ensure that the Fundamental Rights of citizens are not affected and derogation must be proportionate to the emergency, while adopting constitutional as well as extra-constitutional means---Effort to be made to, minimize emergencies and to induce the authorities concerned to respect the Fundamental Rights.

#### **? (tt) Provisional Constitution Order (1 of 1999)---**

---Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra?constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Doctrine of state necessity ---Applicability--?Conditions---Invocation of the "doctrine of State necessity" depends upon the peculiar and extraordinary facts and circumstances of a particular situation--=Superior Courts alone can decide as to whether any given peculiar and extraordinary circumstances warrant the application of doctrine of State necessity or not---Such dependence has a direct nexus with what preceded the action itself---Material available on record generally will be treated at par with the "necessity/State necessity/continuity of State" for the purposes of attaining the proportions justifying its own scope as also the future and expected course of action leading to restoration of democracy.

#### **(uu) Doctrine of necessity---**

--- Not restricted to criminal prosecution alone.

#### **(vv) State necessity, doctrine of---**

---Conditions detailed.

#### **(ww) Provisional Constitution Order (1 of 1999)---**

---Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra?constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validation accorded to the action of the Armed Forces by Supreme Court---Effect---Held, though initially the status of the Government after taking over the affairs of Pakistan was de facto, but in view of the validation accorded by the Supreme Court, it had attained the status of a de jure Government.

#### **(xx) Provisional Constitution Order (1 of 1999)---**

---Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Oath of Office of (Judges) Order (1 of 2000)--?Constitution of Pakistan (1973), Art.184(3)---Extra-constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan--?Validity---Prolonged involvement of Army, its ill effects---Doctrine of state necessity---Applicability---Conditions---All that is required to be considered is that the extra-constitutional action should have

nexus with the facts on the ground---Duty of superior Court is that it recognizes the evil, suggests remedial measures therefor and lays down infrastructure for a journey leading to the restoration of the democratic processes/institutions as expeditiously as possible---If, however, those responsible for achieving said objectives fall short of the measures within the contemplation of the law during their tenures respectively, then the remedy lies in identifying the facts on the ground and taking remedial measures to suppress the evil---Prolonged involvement of the Army in civil affairs runs a grave risk of politicizing it, which would not be in national interest and civilian rule in the country must be restored within the shortest possible time after achieving the declared objectives as reflected in the speeches of the Chief Executive dated 13th and 17th October, 1999 -which necessitated the military take-over---Action of Armed Forces of taking over the affairs of Pakistan qualified for validation on the ground of state necessity/survival in circumstances.

**(yy) Provisional Constitution Order (1 of 1999)---**

---Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra?constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Doctrine of State necessity ---Applicability--?Proclamation to the extent it impinges on the independence of Judiciary is not valid.

**(zz) Provisional Constitution Order (1 of 1999)---**

---Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra?constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Factors---Validity---Doctrine of state necessity--?Applicability---Whole spectrum of circumstances prevalent on or before 12th October, 1999, the day when Armed Forces took over the affairs of Pakistan, revealed that the representatives of the people, who were responsible for running the affairs of the state, were accused of corruption and corrupt practices and failed to establish good governance in the country as a result of which a large number of references had been filed against the former Prime Minister, Ministers, Parliamentarians and members of the Provincial Assemblies for their disqualification on account thereof---Process of accountability carried out by the former. Government was shady, inasmuch as, either it was directed against the political rivals or it was not being pursued with due diligence---All institutions of the state including Judiciary were being systematically destroyed in the pursuit of self-serving policies---Democratic institutions were not functioning in accordance with the Constitution, they had become privy to the one man rule and the very purpose for which they were established stood defeated by their passive conduct---Attempts were made to politicize the army, destabilize it and create dissension within its ranks and had the former Prime Minister been successful in his designs, there would have been chaos and anarchy rather a situation of civil war where some factions of Armed Forces were fighting against others---Action of Armed Forces of taking over the affairs of Pakistan having nexus with the facts on the ground, was qualified to be validated on the ground of State necessity/survival in circumstances.

**(aaa) Provisional Constitution Order (1 of 1999)---**

---Preamble---Constitution of Pakistan (1973), Arts. 184, 46, 48, 90 & 99--?Extra-constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Reference to provision of Arts.46, 48, 90 & 99 of the Constitution was not relevant, which did not provide a solution to an extra-constitutional situation.

**(bbb) Provisional Constitution Order (1 of 1999)---**

---Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Arts. 91 & 184(3)--?Term "Chief Executive", import of---Constitution of Pakistan (1973) envisages -Parliamentary form of Government where the Prime Minister acts as the Chief Executive of the country---By means of Proclamation of Emergency dated 14-10-1999 as also the Provisional Constitution Order, 1999 the Constitution has been only held in abeyance and the country is to be run as nearly as may be in accordance with the Constitution, therefore, Chairman, Joint Chiefs of Staff Committee and Chief of Army Staff while taking over the affairs of the country assumed to himself the title of "Chief Executive"---Validity---Since practically the Chairman, Joint Chiefs of Staff Committee and Chief of Army Staff was performing the functions of the Prime Minister, he held the position of Chief Executive in the scheme of the Constitution of Pakistan.

**(ccc) Provisional Constitution Order (1 of 1999)---**

---Preamble---Proclamation of Emergency by Chief Executive 'of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra?constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Nature---Coup d'etat and revolution--- Coup d'etat and revolution are interchangeable in the context of step of taking over the affairs of Pakistan by the Armed Forces and nothing substantial would turn on considering it from one angle or another.

**(ddd). Provisional Constitution Order (1 of 1999)---**

---Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra?constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Grant of power to Chief Executive of Pakistan to amend the Constitution---Extent---Power of the Chief Executive of Pakistan to amend the Constitution is strictly circumscribed by the limitations down by the Supreme Court---Limitations with regard to amendment of the Constitution by Chief Executive of Pakistan as laid down by the Supreme Court, enumerated.

**(eee) Provisional Constitution Order (1 of 1999)---**

---Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Oath of Office (Judges) Order (1 of 2000), Preamble--?Constitution of Pakistan (1973), Arts.209 & 184(3)---Extra-constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Supreme Judicial Council---Judges of the Supreme Court and High Courts cannot be removed without resorting to the procedure prescribed in Art.209 of the Constitution---Cases of the Judges who ceased to be Judges of the Supreme Court and High Courts by virtue of Oath of .Office (Judges) Order, 2000, however, were hit by the doctrine of past and closed transaction and could not be re-opened.

**(fff) Provisional Constitution Order (1 of 1999)---**

---Preamble---Proclamation of Emergency by Chief Executive of Pakistan. dated 14-10-1999---Constitution of Pakistan (1973), Art. 184(3)---Extra?constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Restoration of democratic institutions---Supreme Court, in view of the circumstances explained by the Attorney-General. observed that there was no choice but to grant reasonable time to enable the Chief Executive to restore the democratic institutions to the rightful holders of the public representation-, under the Constitution.

Wasim Sajjad, M. Rafique Rajwana, Advocates Supreme Court and Ejaz M. Khan, Advocate-on-Record for Petitioner (in .C.R.P, No.208 of 2000).

A. Rahim Kazi, Advocate Supreme Court alongwith petitioner and M.A. Zaidi, Advocate-on-Record for Petitioners (in C.R.P, No. 209 of 2000).

A. Haleem Pirzada, Advocate Supreme Court and IMtiaz M. Khan, Advocate-on-Record for Petitioners (in C.R.P. No.210 of 20pp).

S. Sharifuddin Pirzada, Senior Advocate Supreme Court assisted by Mansoor Ahmed, Deputy Attorney-General and Mehr Khan Malik, Advocate-on-Record for the Federation.

Aziz A. Munshi, Attorney-General assisted by Tanvir Bashir Ansari Deputy Attorney-General, Sher Zaman Khan, Deputy Attorney-General, 'Saeeduz Zafar, Deputy Attorney-General and Mehr Khan Malik, Advocate-on-Record (on Court's call).

Dates of hearing:???????????????????????????????? 6<sup>th</sup> and 7<sup>th</sup> of February, 2001.

### **JUDGMENT**

???????????????????? **IRSHAD HASAN KHAN, CJ.-**? The above petitions under Article 188 of the Constitution of the Islamic Republic of Pakistan, 1973 read with Order XXVI Rule 1 of the Supreme Court Rules, 1980, seek review of judgment dated 12<sup>th</sup> May, 2000 rendered in Constitutional Petitions No. 62/99, 63/99, 53/99, 57/99, 3/2000, 66/99 and? 64/99.

2.???????????????????? At the outset Mr. Wasim Sajjad, learned Senior ASC appearing on behalf of the petitioners in Civil Review Petition No. 208 of 2000, read out the Short Order dated 12<sup>th</sup> May, 2000, whereby it was, *inter alia*, held:

**?For detailed reasons to be recorded later, we intend to dispose of the above petitions under Article 184(3) of the Constitution, directed against the Army take over of 12<sup>th</sup> October, 1999, the Proclamation of Emergency dated 14<sup>th</sup> October, 1999, the Provisional Constitution Order No. 1 of 1999 and the Oath Of Office (Judges) Order No. 1 of 2000, in the following terms:-**

### **?????? INDEPENDENCE OF JUDICIARY**

?Stability in the system, success of the Government, democracy, good governance, economic stability, prosperity of the people, tranquillity, peace and maintenance of law and order depend to a considerable degree on the interpretation of Constitution and legislative instruments by the Superior Courts.? It is, therefore, of utmost importance that the *Judiciary* is independent and no restraints are placed on its performance and operation. It claims and has always claimed that it has the right to interpret the Constitution or any legislative instrument and to say as to what a particular provision of the Constitution or a legislative instrument means or does not mean, even if that particular provision is a provision seeking to oust the jurisdiction of this Court.? Under the mandate of the Constitution, the Courts exercise their jurisdiction as conferred upon them by the Constitution or the law.? Therefore, so long as? the Superior Courts exist, they shall continue to exercise powers and functions within the domain of their jurisdiction and shall also continue to exercise power of judicial review in respect of any law or provision of law, which comes for examination before the Superior Courts to ensure that all persons are able to live securely under the rule of law; to promote, within the proper limits of judicial functions, the observance and the attainment of human and Fundamental Rights; and to administer justice impartially among persons and between the persons and the State, which is a **sine qua non** for the maintenance of independence of *Judiciary* and encouragement of public confidence in the judicial system.??

### **TAKING OF OATH UNDER PCO NO. 1 OF 1999**

?Fresh oath under Oath of Office (Judges) Order No. 1 of 2000, does not in any way preclude the Judges of this Court from examining the questions raised in the above petitions, which have to be decided in accordance with their conscience and law so as to resolve the grave crises and avoid disaster by preventing imposition of Martial Law for which the Constitution does not provide any? remedy.?

New oath of office was taken by the Judges of this Court under PCO No. 1 of 1999 read with Oath of Office (Judges) Order No. 1 of 2000 with a view to reiterating the well established principle that the first and the foremost duty? of the Judges of the Superior Courts is to save the judicial organ of the State.? This was exactly what was done.? By virtue of PCO No. 1 of 1999, the Constitution has not lost its effect in its entirety although its observance as a whole has been interrupted for a transitional period.? The activity launched by the Armed Forces through an extra constitutional measure, involves the violation of ?some of the rights? protected by the Constitution, which still holds the field but some of its provisions have been held in abeyance. A duty is cast upon the Superior Judiciary to offer some recompense for those rights which were purportedly violated in view of the promulgation of? PCO No. 1 of 1999.? This could be achieved only by taking the Oath and not by declining to do so and thereby becoming a party to the closure of the Courts, which would not have solved any problem whatsoever but would have resulted in chaos, anarchy and disruption of peaceful life. Independence of *Judiciary* does not mean that Judges should quit their jobs and become instrumental in the closure of the Courts. Indeed, the latter course would have been the most detestable thing to happen.? Independence of *Judiciary* means that the contentious matters, of whatever magnitude they may be, should be decided/resolved by the Judges of the Superior Courts according to their conscience.? This Court, while performing its role as ?the beneficial expression of a laudable political realism?, had? three options open to it in relation to the situation arising out of the military take-over on Twelfth day of October, 1999:? *firstly,*? it could tender resignation *en bloc*, which most certainly could be equated with sanctifying? (a) chaos/anarchy and (b) denial of access to justice to every citizen of Pakistan wherever he may be;? *secondly*, a complete surrender to the present regime by dismissing these petitions for lack of jurisdiction in view of the purported ouster of its jurisdiction under PCO No. 1 of 1999 and? *thirdly,*? acceptance of the situation as it is, in an attempt to save what ?institutional values remained to be saved?..?? This Court, after conscious deliberations and in an endeavour to defend and preserve the national independence, the security and stability of Pakistan, sovereignty and honour of the country and to safeguard the interest of the community as a whole, decided to maintain and uphold the independence of *Judiciary*, which, in its turn, would protect the State fabric and guarantee human rights/Fundamental Rights.? It took the Oath under PCO No. 1 of 1999 so as to secure the enforcement of law, extend help to the law enforcing agencies for maintenance of public order and with a view to restoring democratic institutions, achieving their stability and guaranteeing constitutional rights to the people of Pakistan.

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Oath of Office prescribed under Articles 178 and 194 of the Constitution for the Judges of the Superior Courts contains a specific provision that a Judge shall abide by the Code of Conduct issued by the Supreme Judicial Council.? Same is the position with regard to the provisions regarding Oath of Office (Judges) Order No. 1 of 2000. The precise provisions in the Oath of Office (Judges) Order, 2000 are that a Judge, to whom oath is administered, shall abide by the provisions of Proclamation of Emergency of? Fourteenth day of October, 1999, PCO No. 1 of 1999, as amended, and the Code of Conduct issued by the Supreme Judicial Council.? But there is specific omission of words, ?to preserve and defend the Constitution?. Adherence to the Code of Conduct has not been subjected to any pre-conditions and there can be no deviation from it by a Judge who takes oath either under the Constitution or PCO No. 1 of 1999 or Oath of Office (Judges) Order No. 1 of 2000.? One of the requirements of the Code of Conduct is that the oath of a Judge implies complete submission to the Constitution, and under the Constitution to the law.? Subject to these governing obligations, his function of interpretation and application of the Constitution and the law is to be discharged for the maintenance of the Rule of Law over the whole range of human activities within the nation.? Thus the new Oath merely indicates that the Superior Judiciary, like the rest of the country had accepted the fact that on 12<sup>th</sup> October, 1999, a radical transformation took place.

### **??????? MAINTAINABILITY OF PETITIONS**

?Notwithstanding anything contained in the Proclamation of Emergency of the Fourteenth day of October, 1999,? the Provisional Constitution Order No. 1 of 1999, as amended and the Oath of Office (Judges) Order No. 1 of 2000,? all of which purportedly restrained this Court from calling in question or permitting to call in question the validity of any of the provisions thereof, this Court, in the exercise of its inherent powers of judicial review has the right to examine the validity of the aforesaid instruments. Additionally, submission of the Federation in response to the Court?s notice concerning its own legitimacy also suggests that this Court has an inherent authority, arising from the submission of both the parties to its jurisdiction, notwithstanding the preliminary objection raised in the written statement as to the maintainability of the above petitions.? In the exercise of its right to interpret the law, this Court has to decide the precise nature of the ouster clause in the above instruments and the extent to which the jurisdiction of the Courts has been ousted, in conformity with the well-established principles that the provisions seeking to oust the jurisdiction of the Superior Courts are to be construed strictly with a pronounced leaning against ouster.?? The Constitution Petitions filed by the petitioners under Article 184(3) of the Constitution are, therefore, maintainable.?

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### **??????? INTERVENTION BY ARMED FORCES**

?National Assembly is the highest representative body, which reflects the will and aspirations of the people of Pakistan.? Similar is the status of a Provincial Assembly? in a Province.? Senate, being a symbol of unity of the federating units has its own utility for the country as a whole.? It is, therefore, of utmost importance that the impugned suspension of the above democratic institutions is examined with great care and caution, otherwise it would adversely affect the democratic processes in the country, which may cause? instability,? impair the economic growth and resultantly? prove detrimental to the general well-being of the people.? However, where the representatives of the people, who are responsible for running the affairs of the State are themselves accused of massive corruption and corrupt practices and in the public as well as private sectors are benefitting therefrom and resist establishing good governance; where a large number of references have been filed against the former Prime Minister, Ministers, Parliamentarians and members of the Provincial Assemblies for their disqualification on account of corruption and corrupt practices;? where there is a general perception that corruption is being practised by diversified strata including politicians, parliamentarians, public officials and ordinary citizens and that a number of Parliamentarians and members of the Provincial Assemblies mis-declared their assets before Election Commission and Tax Authorities; where there was? no political and economic stability and bank loan defaults were rampant and that as per report of Governor, State Bank of Pakistan Rs. 356 billion are payable by the bank defaulters up to 12.10.1999, having no accountability and transparency; where economic stability in Pakistan was highly precarious and there was an overall economic slowdown as GDP growth during the past three years had hardly kept pace with the growth of population; where Pakistan has a debt burden, which equals the country?s entire national income; where all the institutions of the State were being systematically destroyed and the economy was in a state of collapse due to self serving policies of the previous government,? which had threatened the existence, security, economic life, financial stability and credit of Pakistan;?? where a situation had arisen under which the democratic institutions were not functioning in accordance with the provisions of the Constitution, inasmuch as,? the Senate and the National and Provincial Assemblies were closely associated with the former Prime Minister and there was no real democracy because the country was, by and large, under one man rule;? where an attempt was made to politicize the Army, destabilize it and create dissension within its ranks and where the *Judiciary* was ridiculed, leaving no stone unturned to disparage and malign it by making derogatory and contemptuous speeches by some of the members of the previous ruling party inside and outside the Parliament and no Reference was made to the Chief Election Commissioner for their disqualification as members of the Parliament under Article 63 (2) of the Constitution; where the disparaging remarks against the *Judiciary* crossed all limits with the rendering of judgment by this Court in the case of *Sh. Liaquat Hussain v. Federation of Pakistan* (PLD 1999 SC 504), declaring the establishment of Military Courts as *ultra vires* the Constitution, which resulted into a slanderous campaign against the *Judiciary* launched by the former Prime Minister registering his helplessness in the face of the Judiciary not allowing him the establishment of Military Courts as a mode of speedy justice; where the image of the *Judiciary* was tarnished under a well conceived design; where the telephones of the Judges of the Superior Courts and other personalities were tapped in spite of the law laid down by this Court in the case of *Mohtarma Benazir Bhutto v. President of Pakistan* (PLD 1998 SC 388), that tapping of telephones and eavesdropping was? immoral, illegal and unconstitutional;? where storming of the Supreme Court was resorted to allegedly by some of the leaders and activists of the Pakistan Muslim League which ultimately led to the issuance of contempt notices against them/contemners by the Full Bench of this Court in a pending appeal; where Mian Nawaz Sharif?s constitutional and moral authority stood completely eroded and where situation was somewhat similar and analogous to the situation that was prevalent in July, 1977,? the extra constitutional step of taking over the affairs of the country by the Armed Forces for a transitional period to prevent any further destabilization, to create corruption free atmosphere at national level through transparent accountability and revive the economy before restoration of democratic institutions under the Constitution,? is validated, in that Constitution offered no solution to the present crisis.

??????????? In the Commonwealth Finance Ministers Meeting, held on 21-23 September, 1999, commenting on the Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption, it was, *inter alia*, observed that; ?Good governance is not a luxury but a basic requirement for development. Corruption, which undermines development, is generally an outcome and a symptom of poor governance.? It has reached global proportions and needs to be attacked directly and explicitly.????The Commonwealth should firmly commit itself to the policy of ?zero tolerance? of all types of corruption. This policy must permeate national political cultures, governance, legal systems and administration. Where corruption is ingrained and pervasive, especially at the highest political levels, its eradication may require a sustained effort over a protracted period of time. However, the policy of ?zero tolerance? should be adopted from the outset, demonstrating a serious commitment to pursue the fight against

corruption. The Commonwealth should remain firm in its determination that the high standards and goals enunciated in the 1991 Harare Declaration are upheld and enhanced. Creating an environment, which is corruption-free will require vigorous actions at the national and international levels, and within the Commonwealth itself. These actions should encompass the prevention of corruption, the enforcement of laws against it and the mobilization of public support for anti-corruption strategies.?

??????? Probably, the situation could have been avoided if Article 58(2)(b) of the Constitution had been in the field, which maintained parliamentary form of government and had provided checks and balances between the powers of the President and the Prime Minister to let the system run without any let or hindrance to forestall the situation in which Martial Law can be imposed.? With the repeal of Article 58(2)(b) of the Constitution, there was no remedy provided in the Constitution to meet the situation like the present one with which the country was confronted, therefore, constitutional deviation made by the Chief of the Army Staff, General Pervez Musharraf for the welfare of the people rather than abrogating the Constitution or imposing? Martial Law by means of an extra constitutional measure is validated for a transitional period on ground of State necessity and on the principle that it is in public interest to accord legal recognition to the present regime with a view to achieving his declared objectives and that it is in the interest of the community that order be preserved.? Legal recognition/legitimacy can be accorded to the present regime also on the principle that the government should be by the consent of the governed, whether voters or not. Here there is an implied consent of the governed i.e. the people of Pakistan in general including? politicians/parliamentarians, etc. to the army take-over, in that no protests worth the name or agitations have been launched against the army take-over and/or its continuance.? The Court can take judicial notice of the fact that the people of Pakistan have generally welcomed the army take-over due to their avowed intention to initiate the process of across the board and transparent accountability against those, alleged of corruption in every walk of life,? of abuse of national wealth and of not taking appropriate measures for stabilizing the economy and democratic institutions.?? Another principle, which is attracted is that since an extra-constitutional action has been taken by General Pervez Musharraf wielding effective political power, it is open to the Court to steer a middle course so as to ensure that the frame-work of the pre-existing Order survives but the constitutional deviation therefrom be justified on the principle of necessity, rendering lawful what would otherwise be unlawful. However, prolonged involvement of the Army in civil affairs runs a grave risk of politicizing it, which would not be in national interest, therefore, civilian rule in the country must be restored within the shortest possible time after achieving the declared objectives, which necessitated the military take over? and Proclamation of Emergency as spelt out from the speeches of the Chief Executive dated 13<sup>th</sup> and 17<sup>th</sup> October, 1999. The acceptance of the above principles do not imply abdication from judicial review in the transient suspension of the previous legal order.

??????? We accordingly hold as under:-

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???????????????????? 1.??????? On 12<sup>th</sup> October, 1999 a situation arose for which the Constitution provided no solution and the intervention by the Armed Forces through an extra constitutional measure became inevitable, which is hereby validated on the basis of the doctrine of State necessity and the principle of *salus populi suprema lex* as embodied in *Begum Nusrat Bhutto's* case.? The doctrine of State necessity is recognised not only in Islam and other religions of the world but also accepted by the eminent international jurists including *Hugo Grotius*, *Chitty* and *De Smith* and some Superior Courts from foreign jurisdiction to fill a political vacuum and bridge the gap.

???????????????????? 2.??????? Sufficient corroborative and confirmatory material has been produced by the Federal Government in support of the intervention by the Armed Forces through extra constitutional measure.? The material consisting of newspaper clippings, writings, etc. in support of the impugned intervention is relevant and has been taken into consideration as admissible material on the basis of which a person of ordinary prudence would conclude that the matters and events narrated therein did occur.? The findings recorded herein are confined to the controversies involved in these cases alone.

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???????????????????? 3.??????? All past and closed transactions, as well as such executive actions as were required for the orderly running of the State and all acts, which tended to advance or promote the good of the people, are also validated.

???????????????????? 4. ?????? That the 1973 Constitution still remains the supreme law of the land subject to the condition that certain parts thereof have been held in abeyance on account of State necessity;

???????????????????? 5.??????? That the Superior Courts continue to function under the Constitution. The mere fact that the Judges of the Superior Courts have taken a new oath under the Oath of Office (Judges) Order No. 1 of 2000, does not in any manner derogate from this position, as the Courts had been originally established under the 1973 Constitution, and have continued in their functions in spite of the Proclamation of Emergency and PCO No. 1 of 1999 and other legislative instruments issued by the Chief Executive from time to time;

???????????????????? 6.(i)????? That General Pervez Musharraf, Chairman, Joint Chiefs of Staff Committee and Chief of Army Staff through Proclamation of Emergency dated the 14<sup>th</sup> October, 1999, followed by PCO 1 of 1999, whereby he has been described as Chief Executive, having validly assumed power by means of an extra-Constitutional step, in the interest of the? State and for the welfare of the people, is entitled to perform all such acts and promulgate all legislative measures as enumerated hereinafter, namely:-

- a) All acts or legislative measures which are in accordance with, or could have been made under the 1973 Constitution, including the power to amend it;
- b) All acts which tend to advance or promote the good of the people;
- c) All acts required to be done for the ordinary orderly running of the State; and
- d) All such measures as would establish or lead to the establishment of the declared objectives of the Chief Executive.

(ii)??????? That constitutional amendments by the Chief Executive can be resorted to only if the Constitution fails to provide a solution for attainment of his declared objectives and further that the power to amend the Constitution by virtue of clause 6 sub-clause (i) (a) *ibid*? is controlled by sub-clauses (b)(c) and (d) in the same clause.

(iii)??????? That no amendment shall be made in the salient features of the Constitution i.e. independence of Judiciary, federalism, parliamentary form of government blended with Islamic provisions.

(iv)??????? That Fundamental Rights provided in Part II, Chapter I of the Constitution shall continue to hold the field but the State will be authorized to make any law or take any executive action in deviation of Articles 15, 16, 17, 18,

19 and 24 as contemplated by Article 233 (1) of the Constitution, keeping in view the language of Articles 10, 23 and 25 thereof.

(v)??????? That these acts, or any of them, may be performed or carried out by means of orders issued by the Chief Executive or through Ordinances on his advice;

(vi)??????? That the Superior Courts continue to have the power of judicial review to judge the validity of any act or action of the Armed Forces, if challenged, in the light of the principles underlying the law of State necessity as stated above. Their powers under Article 199 of the Constitution thus remain available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any legislative instrument enacted by the Chief Executive and/or any order issued by the Chief Executive or by any person or authority acting on his behalf.

??????????? (vii)????? That the courts are not merely to determine whether there exists any nexus between the orders made, proceedings taken and acts done by the Chief Executive or by any authority or person acting on his behalf, and his declared objectives as spelt out from his speeches dated 13<sup>th</sup> and 17<sup>th</sup> October, 1999, on the touchstone of State necessity but such orders made, proceedings taken and acts done including the legislative measures, shall also be subject to judicial review by the Superior Courts.

6.??????? That the previous Proclamation of Emergency of 28<sup>th</sup> May, 1998 was issued under Article 232(1) of the Constitution whereas the present Emergency of 14<sup>th</sup> October, 1999 was proclaimed by way of an extra-Constitutional step as a follow up of the Army take-over which also stands validated notwithstanding the continuance of the previous Emergency which still holds the field.

??????????? 7.??????? That the validity of the National Accountability Bureau Ordinance, 1999 will be examined separately in appropriate proceedings at appropriate stage.

8.??????? That the cases of learned former Chief Justice and Judges of the Supreme Court, who had not taken oath under the Oath of Office (Judges) Order, 2000 (Order 1 of 2000),? and those Judges of the Lahore High Court, High Court of Sindh and Peshawar High Court, who were not given oath, cannot be re-opened being hit by the doctrine of past and closed transaction.

??????????? 9.??????? That the Government shall accelerate the process of accountability in a coherent and transparent manner justly, fairly, equitably and in accordance with law.

10.??????? That the Judges of the Superior Courts are also subject to accountability in accordance with the methodology laid down in Article 209 of the Constitution.?

11.??????? General Pervez Musharraf, Chief of the Army Staff and Chairman Joint Chiefs of Staff Committee is a holder of Constitutional post. His purported arbitrary removal in violation of the principle of *audi alteram partem* was ab-initio void and of no legal effect.

12.??????? That this order will not affect the trials conducted and convictions recorded including proceedings for accountability pursuant to various orders made and Orders/laws promulgated by the Chief Executive or any person exercising powers or jurisdiction under his authority and the pending trials/proceedings may continue subject to this order.?

??????????? 13.??????? This is not a case where old legal order has been completely suppressed or destroyed, but merely a case of constitutional deviation for a transitional period so as to enable the Chief Executive to achieve his declared objectives.

??????????? 14.??????? That the current electoral rolls are out-dated.? Fresh elections cannot be held without updating the electoral rolls.? The learned Attorney General states that as per report of the Chief Election Commissioner this process will take two years.? Obviously, after preparation of the electoral rolls some time is required for delimitation of constituencies and disposal of objections, etc.

??????????? 15.??????? That we take judicial notice of the fact that ex-Senator Mr. Sartaj Aziz moved a Constitution Petition No. 15 of 1996, seeking a *mandamus* to the concerned authorities for preparation of fresh electoral rolls as, according to Mr. Khalid Anwar, through whom, the above petition was filed, the position to the contrary was tantamount to perpetuating disenfranchisement of millions of people of Pakistan in violation of Articles 17 and 19 of the Constitution.? Even MQM also resorted to a similar Constitution Petition bearing No. 53 of 1996 seeking the same relief.? However, for reasons best known to the petitioners in both the petitions, the same were not pursued any further.

??????????? 16.??????? That having regard to all the relevant factors involved in the case including the one detailed in paragraphs 14 and 15 above three years period is allowed to the Chief Executive with effect from the date of the Army take-over i.e. 12<sup>th</sup> October, 1999 for achieving his declared objectives.

??????????? 17.??????? That the Chief Executive shall appoint a date, not later than 90-days before the expiry of the aforesaid period of three years, for holding of a general election to the National Assembly and the Provincial Assemblies and the Senate of Pakistan.

18.??????? That this Court has jurisdiction to review/re-examine the continuation of the Proclamation of Emergency dated 12<sup>th</sup> October, 1999 at any stage if the circumstances so warrant as held by this Court in the case of *Sardar Farooq Ahmed Khan Leghari v. Federation of Pakistan* (PLD 1999 SC 57).

Before parting with this judgment we would like to record our deep appreciation for the valuable assistance rendered by the learned counsel appearing on behalf of both the parties as also the learned *amicus curiae* all of whom had put forward their view point in the most illuminating manner enabling us to reach the conclusions we did in this judgment.?

3.????????????????????? Mr. Wasim Sajjad has sought review of the judgment dated 12<sup>th</sup> May, 2000, *inter alia*,? on the propositions:

(1) validation given to the Military takeover applying the principle of State necessity; (2) the power to amend the Constitution

conferred on the Chief Executive; and (3) the 3-years time period granted to the present Government.? Elucidating the above pleas, Mr. Wasim Sajjad, learned Senior ASC, appearing in support of C.R.P. No. 208 of 2000, formulated the following points:-

- 1.?? The circumstances in Begum Nusrat Bhutto v. Chief of the Army Staff and Federation of Pakistan (PLD 1977 SC 657) were totally different from the circumstances existing on 12<sup>th</sup> October, 1999 and that the precedent of Begum Nusrat Bhutto has been wrongly invoked in this case;
- 2.?? Begum Nusrat Bhutto's case (supra) had been disapproved in subsequent two judgments of this Court i.e. Sh. Liaquat Hussain v. Federation of Pakistan (PLD 1999 SC 504) and Mehmood Khan Achakzai v. Federation of Pakistan (PLD 1997 SC 426).? The former judgment was referred to by this Court in the judgment under review but the latter was not and that it was not a case where disapproval in subsequent judgments could be treated as *obiter dicta* as indicated in the impugned judgment;
- 3.?? The judgment in Begum Nusrat Bhutto (supra) was also impliedly repealed by the Constitution under Article 270-A;
- 4.?? Under no principle of jurisprudence or of ?necessity? could the ?power to amend the Constitution? be conferred on one person; and
- 5.?? The period of three years granted for return to constitutional rule is the result of an obvious mistake and this period be curtailed to the minimum period as laid down in the Constitution and either the Assemblies be restored or elections be ordered to be held.

4.???????????????????? It was argued that the basic conclusion reached by the Court to the effect that due to the prevalent conditions, the constitutional and moral authority of the Government stood eroded, was erroneous, inasmuch as, there existed sufficient material for validation in Begum Nusrat Bhutto's case (supra) but not in the present case. Referring to the observations at page 701 of the report, Mr. Wasim Sajjad argued that in the light of these facts, it becomes clear that from the 7<sup>th</sup> of March 1977 onward, Mr. Z. A. Bhutto's constitutional and moral authority to rule the country as Prime Minister stood seriously eroded.? He submitted that the authority to rule is derived from the Constitution, which postulates representative system of governance.? He submitted that since the elections were rigged, as noted at pages 183, 187, 190 and 198 of the report on the strength of the verdict of the then Chief Election Commissioner, it was rightly concluded in the precedent case that the constitutional and moral authority of the then Government stood eroded and the military action was justified.? The learned counsel respectfully submitted that there was no allegation of rigging in the 1997 General Elections, international observers found the election fair and free, and the State institutions, namely, the executive, the legislature and the judiciary were functioning in accordance with the Constitution and there was no protest against the Government unlike the situation in 1977, hence the action of 12<sup>th</sup> October 1999 was not justified.? The precise plea was that this Court had taken judicial notice of certain facts to justify Military intervention on grounds of State Necessity and welfare of the people as highlighted in the case of Begum Nusrat Bhutto (PLD 1977 SC 657) but such facts were wholly non-existent in the case in hand, in that, everything was normal and all the institutions were performing their duties in accordance with the Constitution. According to the learned counsel the Law of Necessity was a dead doctrine and was wrongly invoked in the case of Nusrat Bhutto. Since the judgment was delivered in 1977, this Court observed in Sh. Liaquat Hussain's case that the Law of Necessity can not be invoked if its effect is to violate any provision of the Constitution. Nevertheless, even the factors outlined above were not present on 12-10-99 to re-invoke the Law of Necessity. There is thus, an error apparent on the face of the record in the extension of Begum Nusrat Bhutto's case to the situation as it existed on 12th October, 1999.

5.???????????????????? The plea raised by Mr. Wasim Sajjad as to non application of the ?law of necessity? was also substantially raised at the time of hearing of the Constitution Petitions by Ch. Muhammad Farooq, learned Sr. ASC, Mr. Khalid Anwar, learned Sr. ASC, Mr. S.M. Zafar, learned *amicus curiae* vide paragraphs No. 16, 20, 21, 30, 33, 47, 48, 119, 140, 160-162 respectively but the same was repelled by this Court after thorough consideration of all the questions raised before it vide paragraph-253 of the judgment under review, which reads thus:

**253.????** We see no force in the submission of Mr. Khalid Anwar that the ?doctrine of necessity? has since been buried long ago by the British Courts, there was no justification for its resurrection as done in *Special Reference No. 1 of 1955 (supra)* and in the case of Begum Nusrat Bhutto (supra).? Suffice it to say that the precedents from foreign jurisdiction, though entitled to reverence and respect but are not *ipso facto* applicable to the facts and circumstances prevailing on 12<sup>th</sup> October, 1999.? In such matters of extra constitutional nature, in order to save and maintain the integrity, sovereignty and stability of the country and having regard to the welfare of the people which is of paramount consideration for the Judiciary, while interpreting the impugned legislative instruments we have to make every attempt to save ?what institutional values remained to be saved? with a view to maintaining and upholding the independence of Judiciary which in turn would protect the State fabric and guarantee Human/Fundamental Rights.? We are also not inclined to agree with M/S Anwar and Farooq that the ?doctrine of necessity? was rejected in the case of Liaquat Hussain (supra).? As a matter of fact this question was not directly in issue.? It was only obliquely referred to in the context of establishment of Military Courts in terms of Article 245(1) of the Constitution.? It was

not a case where the *vires* of any extra constitutional measure resulting in the change of the government's structure were involved. Be that as it may, one of us (Irshad Hasan Khan, J. as he then was) (now the Chief Justice), specifically took the view that the prerequisites for the application of 'doctrine of necessity' were not satisfied in upholding the establishment of Military Courts in the purported exercise of power under Article 245 (1) of the Constitution even for a limited period. It was also observed that the prerequisites of the 'doctrine of necessity' have been laid down in the cases of *Mustafa Ibrahim* as well as *Begum Nusrat Bhutto (supra)*. For facility of reference the following passages from the case of *Liaquat Hussain (supra)* may be reproduced as under:

758.????????? The plea raised on behalf of the learned Attorney-General that the Doctrine of Necessity is not outdated and can be invoked in the present case for? a 'limited purpose' cannot be countenanced, for, if it is approved of, it may very frequently be resorted to at the incidence of a situation presently prevailing in the country, by the Executive. In fact, such approval whereby the Executive is allowed to cross the barriers of Constitutional provisions at its whim, would turn a democratic rule into a despotic one. Clearly, any deviation from the Constitution may lead to anarchy. It is true that the take-over by the Chief of the Army Staff as Martial Law Administrator was validated by this Court in *Begum Nusrat Bhutto's case* PLD 1977 SC 657 wherein it was *inter alia* observed:-

On no principles of necessity could power of judicial review vested in the Superior Courts under the 1973 Constitution, be taken away? (p.716 last para extending to page 717).

However, in the case of *Asma Jilani (supra)*, this Court took the view that the acts of usurper may be condoned and/or validated by the application of the law of necessity. Viewed from this angle, the impugned Ordinance being *ultra vires* the Constitution cannot be validated even on the touchstone of State necessity. Additionally, in view of the plea raised by the learned Attorney-General that the establishment of Military Courts is spelt out from the power vesting in the Federal Government under Article 245 is contradictory with the theory of State necessity, inasmuch as, the concept of law of necessity, would arise only if an act which would otherwise be illegal becomes legal if it is done bona fide, in view of State necessity, with a view to preserving the State or the society from destruction?.. In the instant case, we have no doubt that the impugned Ordinance was issued bona fide with a view to suppress the menace of terrorism. Nevertheless, the constitutionality of the Ordinance is not to be judged on the question of bona fides of the Federal Government simpliciter but on the touchstone of the Constitutional provisions. Here, impugned legislation is *ultra vires* the Constitution in so far as it takes away the functions of the Courts in determining the guilt or innocence of an accused. Be that as it may, the prerequisites for the application of Doctrine of Necessity are not satisfied in the instant case for upholding the impugned legislation, even for a limited period. The prerequisites, as laid down in the case of Attorney-General of Republic v. *Mustafa Ibrahim* 1964 CLR 195, which was also referred in the *Begum Nusrat Bhutto's case (supra)*, are:-

(a)????? An imperative and inevitable necessity or exceptional circumstances;

(b)????? no other remedy to apply;

(c)????? the measure taken must be proportionate to the necessity; and

(d)????? it must be of a temporary character limited to the duration of the exceptional circumstances.?

In the instant case, the Courts are functioning and the question of backlog and expeditious disposal of terrorists' case can be remedied by taking effective measures, in the light of the guidelines provided by this Court in the short order as well as the recommendations in the concluding paragraphs of this note. The Courts are functioning properly and administering justice according to the Constitution and the law.?

A perusal of the above quoted passages shows that in the circumstances of the case and having regard to the provisions of the Constitution and in view of the situation then prevailing, doctrine of necessity was not attracted and that in this view of the matter Ordinance under which the Military Courts were set up, being a sub-constitutional legislation could not be saved and was, therefore, declared *ultra vires* the Constitution. Contrary to the above case, the Court is here faced with an extra-constitutional situation and all the elements described by this Court in the aforesaid case viz., inevitable necessity, exceptional circumstances, no other remedy to apply, measure taken must be proportionate to the necessity and it must be of temporary character, limited to the duration of exceptional circumstances, are present, inasmuch as, the Constitution provided no solution to meet the extra-ordinary situation prevailing on 12<sup>th</sup> October, 1999. As such, the above case is no hurdle.?

Nothing has been overlooked by this Court nor it has failed to consider any important aspect of the matter, therefore, the above plea is not sufficient to sustain the review petition.?

6.????????????????? Further elaborating his point, Mr. Wasim Sajjad submitted that it is a matter of faith with the people of Pakistan that Supreme Sovereign is Almighty Allah and the Constitution and other laws are made by the representatives of the people under delegated authority wherein the concept of necessity has no place whatsoever and in any case is contrary to Article 2A of the Constitution, which is now a substantive part thereof and can never be suspended nor is there a finding by this Court to the contrary, therefore, there is an error apparent on the face of the record, inasmuch as, Article 2A has not been considered at all.

7.????????????????? Regarding the plea that the doctrine of necessity is contrary to Article 2A of the Constitution, which is now a substantive part thereof and can never be suspended, it will be enough to observe that this plea was taken by Ch. Muhammad Farooq, learned Sr. ASC vide paragraph-30 of the judgment under review. Neither Mr. Khalid Anwar, learned Sr. ASC nor any other learned counsel for the petitioners took this point during the course of hearing of the original petitions. However, it was the case of the Federal Government that the revolutionary political change was not in derogation to the Objectives Resolution as ultimately the method of governance would be through chosen representatives of the people. In this context we would like to refer to paragraph-276 of the judgment under review, which reads as under:

276. Mr. S.M. Zafar, after drawing a distinction between a *coup d'etat* and a revolution submitted that the change on 12<sup>th</sup> October, 1999, does not claim to be based on the principle of revolutionary legality, hence the principle of *Dosso's case* is not relevant and Kelsen's theory is not applicable to the facts and circumstances of the present case. The logical conclusion in view thereof is that the new regime, if it is not a revolutionary regime, cannot claim to be the law giving source and its legislative powers are to be spelt out by the Courts. The case of the Government on the other hand is that once it is found that the prevailing situation did warrant an abrupt change and there was no remedy available under the prevailing Legal Order, the persons responsible for the change are fully competent to bring about such change in law, including the Constitution, which intends to correct the flawed Old Legal Order for preservation of the State as well as welfare of the people as held in *Begum Nusrat Bhutto's case (supra)*.? The learned Attorney General further submitted that revolutionary political change is not in derogation of the Objectives Resolution under Article 2-A of the Constitution, as ultimately the method of governance shall be through chosen representatives of the people.?

The above proposition put forth on behalf of the Federation was not contested by the petitioner's learned counsel in rebuttal, which means that the same was conceded by him, therefore, the same cannot be allowed to be re-argued in these proceedings.

8. As to the allegation of corruption, the learned counsel submitted that notwithstanding the plethora of corruption charges, the former Prime Minister was convicted in only two cases, viz. ?plane hijacking case?, which is not a corruption case and the ?helicopter case? involving declaration of assets as Leader of the Opposition.? He contended that even in the above two cases, the appeals were still pending, when all of a sudden the Prime Minister was exiled, and as a consequence, all allegations stand withdrawn/abandoned, which implies that the main foundation for the respondents' intervention may be deemed to have disappeared. He explained that even in the presence of given allegations, how could a person conclude that the constitutional process did not exist, inasmuch as, the courts were functioning and the government machinery was intact, therefore, it was wrong to condemn the whole system of governance on the basis of two cases and that if that be the criteria for military action, then nothing will prevent future interruptions into the system and the Constitution will be reduced to a mere piece of paper.

9. Quoting paragraph-227 of the judgement regarding House of Lords-debate on military intervention in Pakistan, he explained that this was a mere discussion, participated in by 19 members of the House of Lords out of whom only 3 have been quoted and no resolution was adopted.? The learned counsel submitted that had the Court been informed that corruption cases would be withdrawn, the attitude of the Court would have been different.? Since the cases were not proved, the charge of corruption could not be held to have been established, therefore, removal of Government was illegal and unconstitutional.

10. As to the collapse of economy, with reference to paragraphs-237 and 238 of the judgment under review, he contended that the assertion that the economy was in a bad state, was not correct, inasmuch as, despite one and a half years of existence of the present Government, it has not been able to improve the economic scenario of the country as the inflation continues to rise and the debt problems linger on.? He also quoted the statement of Mr. Hafeez Pasha at pages 604 to 606 of Annexure-I in Paper Book-I and submitted that the economy is a complex phenomenon and there was a sign of revival during the period of former Prime Minister but since correct position was not given by the respondents, hence the Court was deliberately misled to obtain a favourable judgment.

11. In order to reinforce his point, Mr. Wasim Sajjad took exception to the speech of the Chief Executive dated 17<sup>th</sup> October, 1999, in which he had outlined his economic priorities and listed economic recovery as one of the main items of his seven point agenda to contend that unfortunately, in the last nine months, there are no signs of economic recovery and, in fact, in certain respects the economic and financial situation today is worse than it was on 12<sup>th</sup> October, 1999 and that in any case, the performance of the economy is not and cannot be a valid factor for the removal of an elected government or for invoking the law of necessity.

12. As to the above pleas we suffice by observing that by taking the above stance, the petitioners are trying to re-agitate the same issues through this review petition, which is beyond the scope of review.? Moreover, they raise factual controversies, which amounts to re-arguing the same cause, which is also not permissible under the law.? Additionally, this Court never held that the collapse of economy was the only ground for intervention of the Armed Forces.? As a matter of fact, the material relied upon and remarks made by this Court were in response to the assertions made by the petitioners in their original petitions as observed in the Short Order dated 7<sup>th</sup> February, 2001.

13. With reference to paragraph- 243 of the judgment, the learned counsel submitted that in a parliamentary system, the principle of joint ministerial responsibility is applied to the Cabinet, inasmuch as every minister, whether he agrees to a

particular decision of the Cabinet or not, must own such decision.? However, this principle cannot be extended to the members of the Parliament, as the function of the Parliament is not merely to remove the Government but also to legislate and carry out accountability of the government through parliamentary committees in accordance with the procedure, where questions are asked and adjournment motions introduced.? Besides, the accountability by courts is also an on-going exercise.?

14.???????????????? He also quoted a passage from the book titled, ?Constitutional and Administrative Law? by Barnett and an extract from an Article titled, ?Disenchantment with Parliamentary Democracy? by Mr. A. K. Brohi published in PLD 1977 Journal 81, to contend that Parliament cannot be dumped with the government as it is an independent institution and has to perform other distinct functions of which the removal of government, through vote of no confidence, is only one.? He argued that even in advanced democracies, the government is termed as elected dictatorship but,? that hardly justifies military intervention.

15.???????????????? The learned counsel also referred to Pakistan Fisheries Ltd., Karachi v. United Bank Ltd (PLD 1993 SC 109); Trusties of the Port of Karachi v. Muhammad Saleem (1994 SCMR 2213); Dr. Muhammad Iqbal v. Haji Muhammad Akram (PLD 1991 Lahore 8) and Syed Ghayyur Hussain Shah v. Gharib Alam?(PLD 1990 Lahore 432) to contend that every judgment must be read as applicable to the particular facts proved or assumed to be proved.? Since the generality of the expressions, which may be found there, are not intended to be expositions of the law in general, therefore, they govern the particular facts of the case in which such expressions are used.

16.???????????????? Referring to the conferment of power to amend the Constitution, the learned Counsel submitted that the power of amendment is the supreme/sovereign power, which can be exercised only under the Constitution, and cannot be conferred on any individual.? He submitted that since the power to amend the Constitution is not available to this Court, it cannot confer the same on any one else.? He submitted that even Parliament does not possess such power as the amendment procedure and the quantum of votes required for amendment are stipulated in the Constitution itself.? The learned counsel further submitted that despite one and a half years of the present Government, the Constitution has not been amended and the Government is functioning smoothly, therefore, there is no need to confer such power on the Chief Executive. He submitted that the judgment in Begum Nusrat Bhutto's case was impliedly repealed by Article 270A of the Constitution, inasmuch as, the Parliament retrospectively validated all Martial Law orders/regulations.

17.???????????????? The learned counsel also referred to sections 4 and 17 of the Electoral Rolls Act 1974 to contend that the electoral rolls are to be prepared by revising the existing electoral rolls for the time being in force and that the same will be revised and corrected annually in the prescribed manner and form.? Sections 4 and 17 of the Act read thus:

**24. Electoral Rolls for election to the Assemblies.**?The electoral rolls to be prepared under this Act shall be prepared by revising the existing electoral rolls for the time being in force.

????? *Explanation.*?The ?existing electoral rolls? in relation to the first electoral rolls to be prepared under this Act means the electoral rolls prepared under the Electoral Rolls Order, 1969 (P.O. No. 6 of 1969) and, notwithstanding anything contained in this Act, the electoral rolls to be so prepared may be in relation to the same electoral areas as under that Order.?

**17. Annual revision of Electoral Rolls:--** An electoral roll shall be revised and corrected annually in the prescribed manner and form--

(a)??????? ?so as to include the name of any qualified person whose name does not appear on such roll, or

(b)??????? so as to delete the name of any person who has died or who is or has become disqualified for enrolment, or

????????? for correcting any entry or for supplying any omission in such roll:

????????? **Provided** that, if, for any reason, the electoral roll for any electoral area is not revised, the validity or continued operation of the electoral roll shall not thereby be affected.?

18.???????????????? The learned counsel argued that it is the constitutional duty of the Chief Election Commissioner to revise the electoral rolls from time to time as in a parliamentary system, elections may be required to be held any time.? He submitted that since currently elections to the local bodies have been held on the basis of the existing electoral rolls and next phase of elections is scheduled in the month of July, 2001 for which electoral rolls, despite reduction in voting age from 21 to 18 years, would be completed by July 2001, therefore, these rolls may well be made the basis for holding General Elections.

19.???????????????? Referring to press statements of various political leaders, the learned counsel submitted that currently the entire political spectrum in the country is against the continuation of military rule and the public demands return to constitutional dispensation.? He submitted that as per the Secretary General, Commonwealth, if elections are not held in two-years time, Pakistan will be expelled from the? Commonwealth of Nations.

20.???????????????? Mr. Abdul Rahim Kazi, Vice Chairman, Pakistan Bar Council confined his submissions to the Oath of Office by the Judges of the Superior Courts under the PCO and submitted that putting the stamp of validity on Oath of Office (Judges) Order, 2000 (Order No. 1 of 2000) is tantamount to condemning unheard the Judges who were not administered Oath.

21.???????????????? The plea raised by Mr. Abdul Rahim Kazi is untenable in that, the same has been dealt with in paragraph-287 of the judgment under review as under:

“8.????? That the cases of learned former Chief Justice and Judges of the Supreme Court, who had not taken oath under the Oath of Office (Judges) Order, 2000 (Order 1 of 2000),? and those Judges of the Lahore High Court, High Court of Sindh and Peshawar High Court, who were not given oath, cannot be re-opened being hit by the doctrine of past and closed transaction.”

22.???????????????? Mr. Haleem Pirzada, President, Supreme Court Bar Association, submitted that the conditions prevalent on 12<sup>th</sup> October, 1999 did not justify military takeover and in support of his plea quoted the interview of the Chief Executive given to the BBC that the former Prime Minister would have continued in office if he had not removed the Chief of the Army Staff. He further contended that by exiling the former Prime Minister, who was under judicial custody, the warrants issued by Courts were disregarded. He concluded his arguments by submitting that the power to amend the Constitution is not vested in the Court, hence it cannot confer the same on the Chief Executive.

23.???????????????? Syed Sharifuddin Pirzada, learned Senior ASC, representing the Federation gave a brief outline of the points he intended to dilate upon, as below:

????????? 1.????? Scope of review;

2.????? Similarity in the circumstances of (i) in Begum Nusrat Bhutto’s case and (ii) in this cause, in that, the then scenario dated 12.10.1999 was more serious in nature.

?

3.????? Relevance or otherwise of Hafeez Pasha’s report (Vol-II pages 604 Et seq.)

4.????? The import/effect of the dicta in *Sh.Liaquat Hussain (supra)* and *Mahmood Khan Achakzai (supra)* with reference to Begum Nusrat Bhutto’s case.

5.????? The nature and extent of responsibility of the Cabinet to the Parliament.

?

6.????? Conferment of the power to amend the Constitution on one man, as alleged by the petitioners.

7.????? The departure of Nawaz Sharif.

8.????? The time schedule for restoration of democracy.

?????

24.???????????????? Syed Sharifuddin Pirzada contended that in the garb of review petitions an attempt has been made by the petitioners to re-argue the matter.? He submitted that the parameters of review have been fully dealt with by this Court in many a cases.? He referred to the following passage from the case of Mian Rafiq Saigol and another v. Bank of Credit & Commerce International (Overseas) Ltd. and another (PLD 1997 SC 865 at p/867):

“Review proceedings cannot partake re-hearing of a decided case. Therefore, if the Court has taken a conscious and deliberate decision on a point of law or fact while disposing of a petition or an appeal, review of such judgment or order cannot be obtained on the grounds that the Court took an erroneous view or that another view on reconsideration is possible.? Review also cannot be allowed on the ground of discovery of some new material, if such material was available at the time of hearing of appeal or petition but not produced.? A ground not urged or raised at the hearing of petition of appeal cannot be allowed to be raised in review proceedings. Only such errors in the judgment/order would justify review, which are self-evident, found floating on the surface, are discoverable without much deliberations, and have a material bearing on the final result of the case.”

and submitted that all the ingredients which are summarised in the above passage were duly met.

25.???????????????? Syed Sharifuddin Pirzada referred to paragraphs-240 and 252 of the judgment under review to contend that circumstances on 12.10.1999 were not only analogous to the circumstances in Begum Nusrat Bhutto’s case but were more serious in nature.? It would be advantageous to reproduce the said paragraphs hereunder:

“240.????? We have examined this aspect of the case with greater caution as we are not dealing with a case of dissolution of Assembly, but here the Court is faced with a situation not visualized by the Constitution.? On an objective assessment of the material placed on record and in view of the arguments advanced by the parties, we find that the very purposes for which the representative institutions were established under the Constitution stand defeated either directly or indirectly. No one? could disagree that we must have democracy and any obstacles in respect of achieving that goal must be overcome.? But the real question is whether there was ?democracy? in its generally accepted sense on 12<sup>th</sup> October, 1999 when the Army takeover occurred? What regretfully existed in Pakistan on that day and for years prior to that time was merely a feigned appearance of what we can call a form of ?oligarchy? as submitted by Dr. Farooq Hasan.

252.??? ? After perusing the voluminous record and after considering the submissions made by the parties, we are of the view that the machinery of the government at the Centre and the Provinces had completely broken down and the Constitution had been rendered unworkable. A situation arose for which the Constitution provided no solution and the Armed Forces had to intervene to save the State from further chaos, for maintenance of peace and order, economic stability, justice and good governance and to safeguard integrity and sovereignty of the country dictated by highest considerations of State necessity and welfare of the people.? The impugned action was spontaneously welcomed by all sections of the society.?

He also referred to a passage under the heading, ?INTERVENTION BY ARMED FORCES? from the judgment under review starting from? page-306 wherein, after referring to the? case of *Mohtarma Benazir Bhutto v. President of Pakistan* (PLD 1998 SC 388) at page 307, this Court observed as follows :

???that tapping of telephones and eavesdropping was? immoral, illegal and unconstitutional;? where storming of the Supreme Court was resorted to allegedly by some of the leaders and activists of the Pakistan Muslim League which ultimately led to the issuance of contempt notices against them/contemnrs by the Full Bench of this Court in a pending appeal; where Mian Nawaz Sharif?s constitutional and moral authority stood completely eroded and where situation was somewhat similar and analogous to the situation that was prevalent in July, 1977,? the extra constitutional step of taking over the affairs of the country by the Armed Forces for a transitional period to prevent any further destabilization, to create corruption free atmosphere at national level through transparent accountability and revive the economy before restoration of democratic institutions under the Constitution,? is validated, in that Constitution offered no solution to the present crisis.?

26.???????????????? Syed Sharifuddin Pirzada then referred to Hafeez Pasha?s report available at page 604 of Paper Book-II, to contend that the conclusions respectively at pages 608, 609 and 610 of the report supported the case of the Government, as follows:

**Page-608.**

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???In addition, there was growing discontent among the people about the lack of growth in income and employment opportunities and the failure of the Nawaz Sharif government to bring about economic revival.?

**Page 609.**

???while the process of aggressive debt and tax recovery has been welcomed by the people generally and is unambiguously supported, it is likely to affect the liquidity position adversely of major investor groups in the country and lead to distortion in investment choices with a preference for less visible investments.? Second, in the absence of a time framework for transition to an elected government, risk averse investors are like to postpone decisions due to lack of certainty about the continuity of policies beyond the present government.?

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?I also believe that the new government must be given enough time to accomplish two items of immediate importance in its agenda which are popular demands of the people. The first is to initiate and complete speedily the process of across-the-board accountability and the second is to? recover the plundered wealth from loan defaulters and tax evaders.?

He pointed out that the report was written at a time when this Court had not yet pronounced the judgement under review, therefore, the points raised in the above report have been met.

27.???????????????? He informed the Court that considerable progress has been made and that by now Rs. 40 billion have been recovered from the defaulters. Further, that investigations are still on against 23-MNAs, 5-Senators and 28-MPAs.? He placed on record the material in connection with accountability process initiated by the Government.? It would be advantageous to reproduce the summary of cases filed so far under the National Accountability Bureau Ordinance, 1999 showing their status:

**SUMMARY OF NAB CASES**  
**FILED SO FAR AND THEIR STATUS**

Station	Cases filed	Cases Disposed of	Convicted	Acquitted	Balance
Karachi	53	11	11	Nil	41
Lahore	31	03	03	Nil	28
Rawalpindi	27	04	03	01	23
Attock	12	04	04	Nil	08
Peshawar	26	10	07	03	16

Quetta	35	18	18	Nil	17
<b>G. Total</b>	<b>183</b>	<b>50</b>	<b>46</b>	<b>04</b>	<b>133</b>

28.???????????????? Syed Sharifuddin Pirzada assailed the contention that Begum Nusrat Bhutto’s case was not approved by this Court in subsequent judgments in Sh. Liaquat Hussain (supra) and Mahmood Khan Achakzai (supra) and vehemently contended that the former case was actually distinguished by this Court in the judgment under review in paragraph- 253 of the report as under:

????We are also not inclined to agree with M/S Anwar and Farooq that the ‘doctrine of necessity’ was rejected in the case of *Liaquat Hussain (supra)*.? As a matter of fact this question was not directly in issue.? It was only obliquely referred to in the context of establishment of Military Courts in terms of Article 245(1) of the Constitution.? It was not a case where the *vires* of any extra constitutional measure resulting in the change of the government’s structure were involved.? Be that as it may, one of us (Irshad Hasan Khan, J. as he then was) (now the Chief Justice), specifically took the view that the prerequisites for the application of ‘doctrine of necessity’ were not satisfied in upholding the establishment of Military Courts in the purported exercise of power under Article 245 (1) of the Constitution even for a limited period.? It was also observed that the prerequisites of the ‘doctrine of necessity’ have been laid down in the cases of *Mustafa Ibrahim*? as well as *Begum Nusrat Bhutto (supra)*.? For facility of reference the following passages from the case of *Liaquat Hussain (supra)* may be reproduced as under:

758.The plea raised on behalf of the learned Attorney-General that the Doctrine of Necessity is not outdated and can be invoked in the present case for? a ‘limited purpose’ cannot be countenanced, for, if it is approved of, it may very frequently be resorted to at the incidence of a situation presently prevailing in the country, by the Executive. In fact, such approval whereby the Executive is allowed to cross the barriers of Constitutional provisions at its whim, would turn a democratic rule into a despotic one. Clearly, any deviation from the Constitution may lead to anarchy. It is true that the take-over by the Chief of the Army Staff as Martial Law Administrator was validated by this Court in *Begum Nusrat Bhutto’s case* PLD 1977 SC 657 wherein it was *inter alia* observed:-

‘On no principles of necessity could power of judicial review vested in the Superior Courts under the 1973 Constitution, be taken away? (p.716 last para extending to page 717).

‘However, in the case of Asma Jilani (*supra*), this Court took the view that the acts of usurper may be condoned and/or validated by the application of the law of necessity. Viewed from this angle, the impugned Ordinance being *ultra vires* the Constitution cannot be validated even on the touchstone of State necessity. Additionally, in view of the plea raised by the learned Attorney-General that the establishment of Military Courts is spelt out from the power vesting in the Federal Government under Article 245 is contradictory with the theory of State necessity, inasmuch as, the concept of law of necessity, would arise only if an act which would otherwise be illegal becomes legal if it is done bona fide, in view of State necessity, with a view to preserving the State or the society from destruction?.. In the instant case, we have no doubt that the impugned Ordinance was issued bona fide with a view to suppress the menace of terrorism.? Nevertheless, the constitutionality of the Ordinance is not to be judged on the question of bona fides of the Federal Government simpliciter but on the touchstone of the Constitutional provisions. Here, impugned legislation is *ultra vires* the Constitution in so far as it takes away the functions of the Courts in determining the guilt or innocence of an accused. Be that as it may, the prerequisites for the application of Doctrine of Necessity are not satisfied in the instant case for upholding the impugned legislation, even for a limited period. The prerequisites, as laid down in the case of Attorney-General of Republic v. Mustafa Ibrahim 1964 CLR 195, which was also referred in the *Begum Nusrat Bhutto’s case (supra)*, are:-

- ?(a)????? An imperative and inevitable necessity or exceptional circumstances;
  - (b)????? no other remedy to apply;
  - (c)????? the measure taken must be proportionate to the necessity; and
  - (d)????? it must be of a temporary character limited to the duration of the exceptional circumstances.
- In the instant case, the Courts are functioning and the question of backlog and expeditious disposal of terrorists’ case can be remedied by taking effective measures, in the light of the guidelines provided by this Court in the short order as well as the recommendations in the concluding paragraphs of this note. The Courts are functioning properly and administering justice according to the Constitution and the law.?

?A perusal of the above quoted passages shows that in the circumstances of the case and having regard to the provisions of the Constitution and in view of the situation then prevailing, doctrine of necessity was not attracted and that in this view of the matter Ordinance under which the Military Courts were set up, being a sub-constitutional legislation could not be saved and was, therefore, declared *ultra vires* the Constitution.? Contrary to the above case, the Court is here faced with an extra-constitutional situation and all the elements described by this Court in the aforesaid case viz., inevitable necessity, exceptional circumstances, no other remedy to apply, measure taken must be proportionate to the necessity and it must be of temporary character, limited to the duration of exceptional circumstances, are present, inasmuch as, the Constitution provided no solution to meet the extra-ordinary situation prevailing on 12<sup>th</sup> October, 1999.? As such, the above case is no hurdle.?

????????????????????

The precise plea was that perusal of the above passage shows that it was noticed; distinguished and specifically mentioned that the ‘doctrine of necessity’ as enunciated in Begum Nusrat Bhutto’s case is still valid but the conditions laid down therein are to be satisfied.

29.???????????????? So far as Mahmood Khan Achakzai (supra) is concerned, he contended that this case was also analysed by this Court and it approved Begum Nusrat Bhutto’s case; approved the power of amendment of the Constitution as also dealt with the question of one man’s authority? to amend the Constitution.? He further submitted that vide judgment in Achakzai’s case this Court clearly said that by deletion of Article 58(2)(b) the checks and balances have been removed and that for the last ten years

there was no Martial Law but now the situation has changed.? He submitted that this Court approved Begum Nusrat Bhutto?s case at pages 246 and 248 of the judgment under review.

30.????????????????? Taking up the question of collective responsibility of the Cabinet to the Parliament under Article 91(4) and (5) of the Constitution, Syed Sharifuddin Pirzada submitted that not only this Court was conscious of this provision but even with reference to Mother Parliament, judicial notice was taken in paragraph-248 of the judgment under review, of recent publication titled, ?The Hidden Wiring?? *Unearthing the British Constitution* by Peter Hennessy, Arthur Berriedale Keith?s observation and even Walter Bagehot?s observations,? who observed that ?if the elected government behaves like elected dictatorship then undercover intrigues and *coup d?etat* are likely to take place?. He submitted that while making reference to the above provision of the Constitution what was not noticed was the omission of Article 58(2)(b).? Further, that during the last ten years dissolution of Assemblies took place four times and in two cases, dissolution was held to be invalid but in two others it was held otherwise.? He submitted that? a machinery was available but the same was removed even though warning had been given in Mahmood Khan Achakzai (supra). He referred to paragraphs-51 and 54(3) of the above report, which read thus:

?51.????? Mr. Syed Sharifuddin Pirzada has contended that the Eighth Amendment has introduced checks and balances between the power of the President and the Prime Minister. As discussed above, the Constitution of 1973 had vested supreme power to the Prime Minister and though democratic in form it was Prime Minister in character. Amendments made in Article 48, 58, 91 and 92 have curtailed the power of the Prime Minister and have strengthened the? hand of the President. In a democratic system check and balance is provided to avoid autocratic rule and to provide balance of power for a proper functioning of the Government according to the Constitution. No doubt the amendments particularly Article 58(2)(b) have tilted the balance in favour of the President, yet this Court has structured and circumscribed the discretionary power of dissolution. One reason given in favour of Article 58(2)(b) is that it prevents Constitutional deviation. This seems to be plausible because when Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary, the President may exercise his power before any person, agency or authority taking advantage of such situation strikes not at the Assembly but at the Constitution. One may comment that to save the Constitution, Assembly is dissolved. The exercise of power under Article 58(2)(b) or Constitutional deviation can be avoided not by the letters of the Constitution but by political ethics, morality and maturity. Unless a responsible Government exists which has respect for law, opportunity shall continue to be provided for Constitutional strike.?

????????????????? ?54(3). The Objective Resolution was Preamble of the Constitutions made and promulgated in our country in 1956, 1962 and 1973. Perusal of the Objectives Resolution shows that for scheme of governance the main features envisaged are Federalism and Parliamentary Form of Government blended with Islamic provisions. The Eighth Amendment was inserted in the Constitution in 1985, after which three elections were held on party-basis and the resultant Parliaments did not touch this Amendment, which demonstrates amply that this Amendment is ratified by implications and has come to stay in the Constitution unless amended in the manner prescribed in the Constitution as contemplated under Article 239. Article 58(2)(b) brought in the Constitution by the Eighth Amendment, which maintains Parliamentary Form of Government has provided checks and balances between the powers of the President and the Prime Minister to let the system work without let or hindrance to forestall a situation in which martial law could be imposed.?

31.????????????????? Syed Sharifuddin Pirzada then referred to a book titled: **?State of Emergency?: *The Indian Experience*** by Venkat Iyer, wherein under sub-heading ?The Doctrine of Necessity?, it has been observed that: ?Emergency rule - or crisis government, as it is often generically called?is not a recent phenomenon.? The concept has been in existence for almost as long as organised government itself.? Juridically, it is based on the principle of necessity, which recognises the right of every sovereign state to take all reasonable steps needed to protect and preserve the integrity of the state?a right whose importance has been underlined by writers and philosophers down the centuries.???Even Thomas Jefferson, a staunch advocate of limited government, agreed that :

?The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation.? To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and those who are enjoying them with us, thus absurdly sacrificing the end to the means.?

32.????????????????? Referring to the case of *State of Maharashtra v. Ramdas Shrinivas Nayak* (AIR 1982 SC 1249 = 1982 Cr.L.J. 1581), Syed Sharifuddin Pirzada submitted that it is the first case in which Abdul Rehman Antulay, Chief Minister of Maharashtra was involved, who had collected five crore rupees by issuing permits and by other means of corruption for the benefit of Indra Gandhi and through a private complaint prosecution was launched against him; question arose whether Mr. Antulay, who was the Chief Minister could be prosecuted without a proper sanction of the Governor and the Governor was approached to accord sanction.? In the meantime a petition was filed in the High Court where the then Attorney General Mr. Sen appeared for Government of Maharashtra and the Court?s view was in the affirmative but here again a question arose whether the Governor should give the sanction and how i.e. in his discretion or on the advice of the Provincial Cabinet, in that,? there was a Chief Minister

and the Members of the Cabinet are his colleagues.? At this stage Mr. Sen, who was Attorney General, representing the Government of Maharashtra also made a written submission to the following effect:

???????????????????? If in the existing case, the entire Council of Ministers becomes interested in the use of the statutory power one way or the other, the doctrine of necessity will fill up the gap by enabling the Governor by dispensing with the advice of his Council of Ministers and take a decision of his own on the merits of the case.? Such a decision of the Governor must be implied as inherent in his constitutional powers.? The doctrine of necessity will supply the necessary power to the Governor to act without the advice of the council of Ministers in such a case where the entire Council of Ministers is biased.? In fact, it will be contrary to the Constitution and the principles of democratic Government??

???????????

Relying on the above written submission, the Court came to the conclusion that sanction is necessary but the Governor will accord sanction without taking the advice of the Law Minister or any other Minister, against which a petition for special leave to appeal? was filed in the Supreme Court and surprisingly Mr. Sen was again hired to represent the Government. The Supreme Court upheld the judgment of the High Court by pressing into service the ?doctrine of necessity?.

33.???????????????? He submitted that as regards MNAs this Court observed in paragraph-271 of the judgment under review as under:

?271.??? ?? An overall view of the whole spectrum of circumstances prevalent? on or before 12<sup>th</sup> October, 1999 reveals that the representatives of the people who were responsible for running the affairs of the State were accused of corruption and corrupt practices and failed to establish good governance in the country as a result whereof a large number of references have been filed against the former Prime Minister, Ministers, Parliamentarians and members of the Provincial Assemblies for their disqualification on account thereof. The process of accountability carried out by the former government was shady, inasmuch as, either it was directed against the political rivals or it was not being pursued with due diligence. ?????????? We have also noted with concern that all institutions of the State including Judiciary were being systematically destroyed in the pursuit of self-serving policies.????? We uphold the plea raised on behalf of the Federation that the democratic institutions were not functioning in accordance with the Constitution, they had become privy to the one man rule and the very purposes for which they were established stood defeated by their passive conduct.??

He submitted that this question has also been dealt with by this Court at paragraph-287 of the judgment under review under the heading

?INTERVENTION BY ARMED FORCES? as under:

?National Assembly is the highest representative body, which reflects the will and aspirations of the people of Pakistan.? Similar is the status of a Provincial Assembly? in a Province.? Senate, being a symbol of unity of the federating units has its own utility for the country as a whole.? It is, therefore, of utmost importance that the impugned suspension of the above democratic institutions is examined with great care and caution, otherwise it would adversely affect the democratic processes in the country, which may cause? instability,? impair the economic growth and resultantly? prove detrimental to the general well-being of the people.? However, where the representatives of the people, who are responsible for running the affairs of the State are themselves accused of massive corruption and corrupt practices and in the public as well as private sectors are benefiting therefrom and resist establishing good governance; where a large number of references have been filed against the former Prime Minister, Ministers, Parliamentarians and members of the Provincial Assemblies for their disqualification on account of corruption and corrupt practices;? where there is a general perception that corruption is being practised by diversified strata including politicians, parliamentarians, public officials and ordinary citizens and that a number of Parliamentarians and members of the Provincial Assemblies mis-declared their assets before Election Commission and Tax Authorities; where there was? no political and economic stability and bank loan defaults were rampant and that as per report of Governor, State Bank of Pakistan Rs. 356 billion are payable by the bank defaulters up to 12.10.1999, having no accountability and transparency; where economic stability in Pakistan was highly precarious and there was an overall economic slowdown as GDP growth during the past three years had hardly kept pace with the growth of population; where Pakistan has a debt burden, which equals the country?s entire national income; where all the institutions of the State were being systematically destroyed and the economy was in a state of collapse due to self serving policies of the previous government,? which had threatened the existence, security, economic life, financial stability and credit of Pakistan;?? where a situation had arisen under which the democratic institutions were not functioning in accordance with the provisions of the Constitution, inasmuch as,? the Senate and the National and Provincial Assemblies were closely associated with the former Prime Minister and there was no real democracy because the country was, by and large, under one man rule;? where an attempt was made to politicise the Army, destabilise it and create dissension within its ranks and where the *Judiciary* was ridiculed, leaving no stone unturned to disparage and malign it by making derogatory and contemptuous speeches by some of the members of the previous ruling party inside and outside the Parliament and no Reference was made to the Chief Election Commissioner for their disqualification as members of the Parliament under Article 63 (2) of the Constitution; where the disparaging remarks against the *Judiciary* crossed all limits with the rendering of judgment by this Court in the case of *Sh. Liaquat Hussain v. Federation of Pakistan* (PLD 1999 SC 504), declaring the establishment of Military Courts as *ultra vires* the Constitution, which resulted into a slanderous campaign against the *Judiciary* launched by the former Prime Minister registering his helplessness in the face of the Judiciary not allowing him the establishment of Military Courts as a mode of speedy justice; where the image of the *Judiciary* was tarnished under a well conceived design; where the telephones of the Judges of the Superior Courts and other personalities were tapped in spite of the law laid down by this Court in the case of *Mohartma Benazir Bhutto v. President of Pakistan* (PLD 1998 SC 388), that tapping of telephones and eavesdropping was? immoral, illegal and unconstitutional;? where storming of the Supreme Court was resorted to allegedly by some of the leaders and activists of the Pakistan Muslim League which ultimately led to the issuance of contempt notices against them/contemners by the Full Bench of this Court in a pending appeal; where Mian Nawaz Sharif?s constitutional and moral authority stood completely eroded and where situation was somewhat similar and analogous to the situation that was prevalent in July, 1977,? the extra

constitutional step of taking over the affairs of the country by the Armed Forces for a transitional period to prevent any further destabilisation, to create corruption free atmosphere at national level through transparent accountability and revive the economy before restoration of democratic institutions under the Constitution,? is validated, in that Constitution offered no solution to the present crisis.?

Syed Sharifuddin Pirzada submitted that in this view of the matter, this Court validated the impugned action dated 12.10.1999, which was a very conscious decision and then referred to a compliment by John Clifford Wallace, a retired Judge of the United States at page-2 of the Supplementary Paper Book (reported in Dawn dated 9.12.2000) in the following words:

?When asked to comment on the administration of oath to judges on the Provisional Constitutional Order (PCO),? he said one should not have very rigid view on such issues. ?What would have happened had nobody taken oath on the document,? he said.

?He said after taking oath on the PCO the judiciary had given a very courageous verdict in a case challenging the military action of October 12. He said the court gave a specific time-frame for holding of elections and return to democracy.?

34.????????????????? While advancing his arguments on the question of conferring power on one man to amend the Constitution, Syed Sharifuddin Pirzada vehemently contended that what was accepted and established in Begum Nusrat Bhutto?s case in 1977 was recognition of a reality and that two renowned jurists in the country, whose ability and integrity is above board, namely, Justice A.R. Cornelius and Justice Hamoodur Rehman, proposed something similar when an akin situation arose. He submitted that Begum Nusrat Bhutto (supra) has been approved, among others, by the Court of Appeal of Grenada and this Court had discussed this case in detail? in the judgment under review as also reaffirmed in Achakzai?s case (PLD 1997 SC 426) and the caution mentioned in the last case that checks and balances are necessary for prevention of such situations was completely ignored. He submitted that the same caution is reflected in concrete terms in the drafts prepared by Justice A. R. Cornelius and Justice Hamud-ur-Rahman, former Chief Justices of Pakistan.? He referred to a passage at page 245 from the draft Constitution prepared by Justice A.R. Cornelius in support of his plea, which reads thus:

?It shall be within the power of the Commander-in-Chief of the Pakistan Army, who shall be the Chief Martial Law Administrator, to suspend for the duration of the Martial Law, or any shorter period as may be specified, the operation of specified provisions of this Constitution, but he shall not have power to abrogate this Constitution.?

He submitted that Justice Hamoodur Rahman wrote a detailed note on the working of the Constitution of 1973 and while talking about checks and balances he observed that on appropriate occasions Martial Law can be imposed.

35.????????????????? Dilating on departure of Nawaz Sharif, Syed Sharifuddin Pirzada referred to page-11 of the Supplementary Paper Book, a press clipping of Daily ?The News? dated 21.12.2000, captioned ?CE kills rumours about civilian setup? wherein it is reported that while addressing the nation: ?He disclosed Nawaz? Sharif, Shahbaz Sharif, Abbas Sharif and Hussain Nawaz had signed an appeal after which the President remitted Nawaz?s 14-year R.I. sentence.??? He pointed out that Mr. Nawaz Sharif is convicted? in two cases: one in hijacking case by Special Court which was upheld in appeal and he was given sentence of life imprisonment plus fine and second is the case of Helicopter wherein he was sentenced to 14 years and disqualification for 21 years plus fine and further that what was remitted is only the sentence of imprisonment. He submitted that the Chief Executive further disclosed as under:

????????????????? ?General Musharraf said that Pakistan had information but no evidence about Sharifs assets abroad. ?I know billions of dollars have been sent outside Pakistan but there is no proof. Flats in London are not in the name of Nawaz Sharif.? ?

36.????????????????? Syed Sharifuddin Pirzada, on instructions, in response to the Court?s query, made the following statement:

(i)????????? ?Your lordship has asked about the date of the proposed elections and restoration of the democratic institutions. First, I refer to your lordship?s judgment. How careful your lordships have been. And this is a departure from Nusrat Bhutto?s case.

????????????? ??? ?Paragraph 16 and 17 at page 313 of the above judgment read as under :

?16.????????????? That having regard to all the relevant factors involved in the case including the one detailed in paragraphs 14 and 15 above three years period is allowed to the Chief Executive with effect from the date of the Army take-over i.e. 12<sup>th</sup> October, 1999 for achieving his declared objectives.

? ?17.????????? That the Chief Executive shall appoint a date, not later than 90-days before the expiry of the aforesaid period of three years, for holding of a general election to the National Assembly and the Provincial Assemblies and the Senate of Pakistan.?

(ii)????????? So the date is to be appointed not later than 90 days before the expiry of aforesaid period of three years. Now this was accepted by General Musharraf in the Press Conference on 25.5.2000 at Islamabad, when the Short Order was already announced, relevant portion whereof reads thus:

??**Ans.** Timeframe, you see, it is a Supreme Court Decision which we accept in its right spirit.? It is a balanced judgment.? They have given this timeframe according to their own judgment.? And,? as I said we will try our level best to meet this timeframe, and if there occurs any fluctuation then we will see it afterwards.? With our best efforts we will certainly meet the timeframe since this is the decision of the Supreme Court.

????????????????????? **Q.**????????????????????? Will you give us perhaps a ?Yes? or ?No? answer as to whether you will accept the three year?s deadline?

????????????????????? **Ans.**????????????????? Yes.

????????????????????? **Q.**????????????????????? Will you hand back powers to civilians within three years?

????????????????????? **Ans.**????????????????? Yes, Obviously, this is the Supreme Court judgement which has to be accepted.?

?(iii)????? The Federal Cabinet on Wednesday last? resolved ?????? to complete the government?s agenda, including the establishment of a true democracy within three years as stipulated in the May 12 verdict of the Supreme Court.

?(iv)????? I take the liberty and seek indulgence to refer to the news item today, an interview was given to Gulf News wherein General Pervez Musharraf reaffirmed that the schedule will be adhered to.? This has been reproduced in the Daily ?Jang? of today?s issue also.? My Lord so far as the date is concerned, very pertinently you lordship asked the question? but it was reflected in your lordship?s considered judgment and this has been accepted.?

?(v)????? I have sought the instructions.? Under instructions from the competent authority, I reaffirm the assurances which have been given and which I have read out earlier.??

37.????????????????????? He concluded his arguments with the submission that so far as one man rule is concerned, actually even under section 9 of the Indian Independence Act, 1947, a provision was made, which was discussed at length in The Superintendent, Land Customs, Torkham (Khyber Agency) v. Zewar Khan and 2 others (PLD 1969 SC 485) the relevant portion whereof is at Page 503, which reads as follows:

??(c) for making omissions from, additions to, and adaptations and modifications of, the Government of India Act, 1935,? and the Orders in Council, rules and other instruments made thereunder, in their application to the separate new Dominions;?

According to him, in the above report it was further held that the view taken by the Peshawar High Court is incorrect and in this behalf reliance was placed on Dawarkadas and another v. The State (PLD 1957 SC [Pak] 72).? Further, Quaid-i-Azam Muhammad Ali Jinnah himself made amendments in the Government of India Act, 1947 and Governor General of India also effected amendments on the advice of Dr. Ambedkar another eminent jurist.? He contended that this is not a new or novel provision and some other colonies where independence was given by Orders in Council, the Governors General could promulgate Constitutions, amend them and amend even whatever was already there.

38.????????????????????? Mr. Aziz A. Munshi, appearing as Attorney General, on Court?s notice, supported the submissions made by Syed Sharifuddin Pirzada, learned Senior ASC, representing the Federation.

39.????????????????????? Mr. Wasim Sajjad, learned Senior ASC, in rebuttal, referred to the cases of Mian Rafiq Saigol v. Bank of Credit and Commerce International (Overseas) Ltd. (PLD 1997 SC 865); Federation of Pakistan v. Muhammad Tariq Pirzada (1999 SCMR 2189) and Abdul Ghaffar-Abdul Rehman v. Asghar Ali reported as (NLR 1998 Civil 305)=(PLD 1998 SC 363)? to contend that a review petition is competent if there is an obvious error on the face of record or there is something floating on the surface or review is warranted in the interest of justice.? He? quoted the following paragraph from the judgment in Abdul Ghaffar Abdul Rehman (supra):

??15.????? We may now refer to the judgments relied upon by the learned counsel for the parties. Mr. S. Sharifuddin Pirzada has referred to the following cases :

(i)????????? Lt. Col. Nawabzada Muhammad Amir Khan v. The Controller of Estate Deputy, Government of Pakistan, Karachi and others (PLD 1962 SC 335).

(ii)????????? Fida Hussain v. The Secretary, Kashmir Affairs and Northern Affairs Division, Islamabad and another (PLD 1995 SC 701).

(iii)????????? Suba through Legal Heirs v. Fatima Bibi through Legal Heirs and others (1996 SCMR 158).

(iv)????????? Mian Rafiq Saigol and another v. Bank of Credit and Commerce International (Overseas) Limited and another (PLD 1997 SC 865).

(v)????????? Unreported -order in Civil Review Petition No.1-K of 1989 (Begum Asfar Saeed and others v. Ch.Abdul Aziz) rendered by this Court on 10.3.1991.?

Mr. Wasim Sajjad submitted that he relies on all the above precedents and particularly on the observations of Chief Justice A.R. Corlenius to the effect that ???there is no restriction on the power of review?. He also relied on paragraph-17(vi) at page 327 of the report which reads thus:

??17-(vi) That if the error in the judgment/order is so manifest and is floating on the surface, which is so material that had the same been noticed prior to the rendering of the judgment the conclusion would have been different, in such a

case a review petition would lie.?

He also placed reliance on paragraph-18 of the Report, which reads thus:

?If we were to apply the above principle of law to the case in hand, it becomes evident that this Court has overlooked a very important and obvious fact that the cause of action to a tenant to apply to the Rent Controller for an order directing that he be put in possession of such area in the new building which does not exceed the area which he was in occupation in the old building, in case the ejectment order is granted under section 13(2)(vi) of the Ordinance on the ground of reconstruction arises under sub-section (5-B) thereof not at the time of grant of ejectment order but before the completion of new building and its occupation by another person. This Court has also overlooked the legal implication of the use of the word 'area' in the new building and not the words 'shop or residential premises'.? As a corollary it must follow that the conclusion recorded by this Court in the above earlier cases on the basis of the approved plans, even before the commencement of the construction of the then proposed building that the provision of sub-section (5-B) of Section 13 of the Ordinance would come into play if the reconstructed building was of the same type and character and suitable for the same use as was the old building not warranted by law, as it pre-empted the causes of action of the tenants which had by then not accrued to them. The question whether a tenant is entitled to invoke above sub-section (5-B) of Section 13 of the ordinance, cannot be decided on the basis of the approved plan, which a landlord may produce at the time of seeking ejectment order but it is to be determined on the basis of the building which is actually constructed. We may again point out that a landlord may construct a building other than of which he got the plan approved. In other words, he may deviate from the approved plan. The view, which we are inclined to take, is in line with the judgment of this Court in the case of Hasan and others v. Fancy Foundation (supra), quoted hereinabove in para 12, of which notice was not taken in the judgment under review.?

40.????????????????? Mr. Wasim Sajjad respectfully submitted that? eminence and intellectual calibre of Justice A.R. Cornelius and Justice Hamoodur Rahman is duly recognised by all of us but? what has been overlooked is that their lordships had recommended inclusion of these provisions in the Constitution and there is no jurisprudence in the world where without inclusion of such provisions in the Constitution one man can be given the right to amend the Constitution, particularly when this Court has already held that the Constitution remains the supreme law of the land.? He added that even a rule or bye-law cannot be amended by one person.

41.????????????????? He emphasised that Syed Sharifuddin Pirzada after receiving instructions has reaffirmed that the elections will be held within the schedule laid down by this Court, therefore, an assurance may also be sought from him that he will not seek extension of time.

42.????????????????? Mr. Abdul Haleem Pirzada, learned ASC, in rebuttal, emphasised his earlier stand reflected in paragraph-178 of the judgment under review to the following effect:

?178.??? Before concluding his arguments, he reiterated that the Court may consider to allow twelve months? time to the Armed Forces from now so that they can do the cleansing and go back to their Barracks.?

43.????????????????? We have heard the learned counsel for the parties and have also considered the material placed on record. Some of the questions raised on behalf of the petitioners have been dealt with in the preceding paragraphs. As to the remaining pleas raised on behalf of the petitioners vide paragraphs-8, 9, 13 to 19 and 22 we would suffice by observing that the same were thoroughly dealt with in our Short Order dated 7<sup>th</sup> February, 2001, which reads thus:

#### **SHORT ORDER**

?The above petitions under Article 188 of the Constitution of the Islamic Republic of Pakistan, 1973 read with Order XXVI Rule 1 of the Supreme Court Rules, 1980, seek review of judgment dated 12<sup>th</sup> May, 2000 rendered in Constitutional Petitions No. 62/99, 63/99, 53/99, 57/99, 3/2000, 66/99 and? 64/99.?

?2.????????????????? When the Chief Executive issued Oath of Office (Judges) Order, 2000 (Order No.1 of 2000), it was specifically stated therein that Pakistan is to be governed, as nearly as may be, in accordance with the Constitution and the Chief Executive has and shall be deemed always to have had, the power to amend the Constitution.?

?3.????????????????? This Court, however, did not concede that claim through the judgment under review.? The Court observed that the Chief Executive/Armed Forces have no power to amend the salient features of the Constitution relating to independence of judiciary, federalism and parliamentary form of government blended with Islamic provisions.? It also stated in unequivocal terms that prolonged involvement of the Army in civil affairs runs a grave risk of politicising it, which would not be in the national interest, therefore, civilian rule in the country must be restored within the shortest possible time after achieving the declared objectives which necessitated the Military Takeover, as spelt out in the speeches of the Chief Executive dated 13<sup>th</sup> and 17<sup>th</sup> October, 1999.? The Court emphasised that the legitimacy conferred on the present Regime, on the touchstone of the doctrine of state necessity/state survival, does not imply abdication of the power of judicial review in the transient suspension of the previous legal order.? It also held that the 1973 Constitution still remains the supreme law of the land subject to the condition that certain parts thereof have been held in abeyance on account of state necessity/state survival.? The result is that notwithstanding the purported ouster of jurisdiction of all the Courts in Pakistan to challenge any action, order or law promulgated by the Chief Executive, the Supreme Court has ruled that every action of the Chief Executive/Armed Forces is open to judicial review through appropriate writs/petitions in line with the principles laid down in the judgment under review.? Similarly, the Fundamental Rights were also held to be intact and justiciable.?

?4.????????????????? We have clearly stated in paragraph No. 270 of the judgment sought to be reviewed that the action of 12<sup>th</sup> October, 1999 being what it is, qualifies for validation on the ground of State necessity/survival.? It is for the representatives of the people to see to it that everything is in order and no body can raise his little finger when

their actions are in line with the fundamentals of the Constitution.? No rule except that by the representatives of the people within the contemplation of the Constitution and the law has the support of the Superior Judiciary.? We are firmly committed to the governance of the country by the people's representatives and we reiterate the definition of the term 'democracy'? to the effect that 'it is government of the people, by the people and for the people'? and not by the? Army rule for an indefinite period.??

**75.????????????????** Having regard to all the relevant factors involved in the case three years period has been allowed to the Chief Executive with effect from the date of the Army take-over i.e. 12<sup>th</sup> October, 1999 for achieving his declared objectives and to appoint a date, not later than 90-days before the expiry of the aforesaid period of three years, for holding of general elections to the National Assembly and the Provincial Assemblies and the Senate of Pakistan. We have stated in paragraph No. 267 of the judgment under review that though initially the status of the present Government was *de facto*, but in view of the validation it has attained the status of a *de jure* Government. The validation and legitimacy accorded to the present Government is conditional and inter-linked with the holding of general elections to the National Assembly and the Provincial Assemblies and the Senate of Pakistan within the time frame laid down by this Court leading to restoration of the democratic institutions.?

**76.????????????????** Accountability is an on going process and the same shall continue with a view to completing it even by the successive governments.? We would refrain from dilating further on this issue, in that, legality or otherwise of National Accountability Bureau Ordinance, 1999 is *sub judice* before a Bench of this Court.? Same is the position with regard to the exit of the former Prime Minister to Jeddah, which having been challenged in the Lahore High Court, Lahore is a *sub judice* matter.? Any expression of opinion on the said issue will tantamount to pre-empting the ultimate result thereof.?

**77.????????????????**

**77.????????????????** There is no glaring omission or patent mistake floating on the surface in the judgment under review.? Nothing has been over-looked by the Court nor it has failed to consider any aspect of the attending matters.?

The situation prevailing on or before 12<sup>th</sup> Oct., 1999 and for which the Constitution provided no solution and the Armed Forces had to intervene to save the State from further chaos, maintenance of peace and order, economic stability, justice, good governance and to safeguard the integrity and sovereignty of the country dictated by the highest considerations of state necessity and welfare of the people.?

**78.????????????????** The petitioners cannot be permitted to re-argue the case and seek reversal of conclusions earlier reached by this Court after full application of mind deliberatively and consciously in the judgement sought to be reviewed.?

**79.????????????????** The argument advanced on behalf of the petitioners is that none of the alleged grievances against the removed government, including the charges of corruption and lack of good governance, was such which could not have been redressed within the four corners of the Constitution because laws and machinery to redress such a grievance was already in existence and, if as alleged, the government of the day did not take appropriate steps it was open to this Court to direct the taking of specific steps in exercise of powers under Article 184(3) of the Constitution read with Article 187 thereof, therefore the observation of this Court that Law of Necessity could validly be invoked to suspend the Constitution as it had no answer to the situation that had arisen, needs to be reviewed.?

**710.????????????????** The above plea was also raised by Ch. Muhammad Farooq, learned Sr. ASC, Mr. Khalid Anwar, learned Sr. ASC, Mr. S.M. Zafar, learned amicus curiae and Mr. Haleem Pirzada, President, Supreme Court Bar Association vide paragraphs 18, 34, 139, 164 and 172 respectively of the judgment under review and repelled after due consideration.? The petitioners, therefore, cannot be allowed to re-argue the same in these proceedings.? In this connection, reference to paragraph No. 271 of the judgment under review is relevant, which reads thus:

**7271.??????** An overall view of the whole spectrum of circumstances prevalent on or before 12<sup>th</sup> October, 1999 reveals that the representatives of the people who were responsible for running the affairs of the State were accused of corruption and corrupt practices and failed to establish good governance in the country as a result whereof a large number of references have been filed against the former Prime Minister, Ministers, Parliamentarians and members of the Provincial Assemblies for their disqualification on account thereof. The process of accountability carried out by the former government was shady, inasmuch as, either it was directed against the political rivals or it was not being pursued with due diligence. ??????????

**7272.??????** We have also noted with concern that all institutions of the State including Judiciary were being systematically destroyed in the pursuit of self-serving policies.?????? We uphold the plea raised on behalf of the Federation that the democratic institutions were not functioning in accordance with the Constitution, they had become privy to the one man rule and the very purposes for which they were established stood defeated by their passive conduct.??

**711.????????????????** The rampant corruption was only a cumulative reason for the validation of the military action of 12<sup>th</sup> October, 1999, which resulted into the suspension of Assemblies and removal of the government as succinctly explained in paragraph No. 234 of the judgment under review, which reads thus:

**7234.?????** Although we are dealing with a case of intervention by the Armed Forces, yet it would be advantageous to allude to the ground of corruption, which came up for consideration in the cases of *Kh. Ahmed Tariq Rahim* (PLD 1992 SC 646), *Mian Muhammad Nawaz Sharif* (PLD 1993 SC 473) and *Benazir Bhutto* (PLD 1998 SC 388) (*supra*). In the first case, it was observed by Shafiur Rehman, J. that corruption may not have been independently sufficient to warrant such an action, but it can be invoked, referred to and made use of along with other more relevant grounds, which are by themselves sufficient to justify the action taken.? In *Mian Muhammad Nawaz Sharif's case* (*supra*), it was observed that 'if the corruption, nepotism and favouritism are of such a large scale that they have resulted in the breakdown of the constitutional machinery completely, it may have nexus with the above provision'. In the third case of Benazir Bhutto, this Court took notice of enormous corruption and treated it as an independent ground on the basis of which an Assembly could be dissolved (Underlining is by way of emphasis). Once corruption pervades in the body politic and official circles, then the entire government/ administration becomes completely crippled and paralyzed. Recounting the instances of alleged corruption the Federation has? pointed out? Sharifs? ownership of Cayman Island, an offshore company through Al-Towfeek Co. and the case of huge quantity sugar export to India - receiving heavy amounts in rebate. When corruption permeates in the social, political and financial transactions to such an extent that even proper and honest orders and transactions are suspected to the point of belief being a result of corruption, one is compelled to infer all is not well and corruption has gone deep in the roots.? No doubt, this is an age of 'corruption eruption', but during the last few years there have been large scale prosecutions of former world leaders in various countries on the charges of corruption and corrupt practices, in some cases leading to convictions, which phenomenon must not be taken lightly and the issue must be addressed adequately and effectively through transparent institutionalized processes.?

**712.????????????????** As to the plea that the members of Parliament and Provincial Assemblies cannot be condemned as a class because of real or imaginary allegations against a small minority out of nearly eight hundred members, especially in view of this Court's view in a number of cases that no adverse comments can be made against persons who are not parties before the Court and thus had no opportunity to answer the charges against them, therefore, the observation condemning the Parliamentarian as a class requires re-consideration, suffice it to say that it

was clearly stated in paragraph No. 235 of the judgment under review that the observations made therein were not intended to condemn *en bloc* the politicians and parliamentarians.? The findings recorded in the judgment under review were confined to the controversies involved in these cases alone as is apparent from a bare perusal of paragraph No. 2 of the operative part of the Short Order, reproduced above as well as paragraph No. 235 of the judgment under review, which reads thus:

??235.????? The observations made herein and in the Short Order are not intended to condemn *en bloc* the politicians and parliamentarians as a class.? Undoubtedly, there are good, honest and upright as well as corrupt people in every group of persons.? These observations are confined only to the situation which is being attended to in these cases.? Any proceedings commenced against any person including the parliamentarians or politicians or members from the general public under the laws of the country will, no doubt, be decided on their own merits in accordance with law and on the basis of the legally admissible material brought before the concerned fora in those proceedings without being influenced by any observations made in this judgment.? Put differently, it will be only after the finalisation of the proceedings as above that the country will be geared up for resort to democratic principles and corruption-free society which are prerequisite for good governance.? This situation has also been recognized by the Commonwealth Finance Ministers Meeting held on 21-23 September, 1999 at Grand Cayman, Cayman Islands.??

**?13. ?????????????? As to the plea of ?Collapse of Economy? it would be advantageous to reproduce paragraphs No. 237 and 238 on the above subject:**

??237.????? We now take up another allied issue relating to economic condition of the country. It was alleged on behalf of the Federation that the former Prime Minister and his business associates exported sugar produced in their sugar mills to India by rail and earned millions of rupees as profit.? It was pointed out that several SROs were promulgated by the then government to claim export rebate on sugar and thereby the former Prime Minister and his predecessor committed breach of faith with Pakistani banks/overseas and resident Pakistanis by removing 11 billion dollars lying in their accounts in the banks in Pakistan without their consent and utilized the same for unauthorized purposes, which remain unexplained till today.? It was further stated that the former government froze the FEBC accounts and misappropriated the foreign exchange belonging to resident and non-resident Pakistanis, which not only brought bad name to the Pakistani banks but also to Pakistan as a country and the responsibility of this huge fraud lies heavily on the former Prime Minister.? It was pleaded that this misconduct was further compounded by unlawful transfer of a huge sum of nearly 500 million dollars by the former Prime Minister and his associates between 6.5.1998 to 28.5.1998, to the detriment of the country.? Even after the decision to freeze the foreign currency accounts the former Prime Minister and his associates removed huge amounts of foreign currency after banking hours.? In this process the then Director General, FIA stopped Mr. Mujeeb-ur-Rehman, the brother of Senator Saifur Rehman from removing large amount of foreign exchange in cash at the Islamabad Airport, as a result of which Major General (Retd) Inayatullah Niazi, the Director General, FIA was illegally removed by the former Prime Minister.? Our attention was also drawn to the ?*Qarz Utaro Mulk Sanwaro*? Scheme to demonstrate that it was designed to deprive the Overseas Pakistanis of their hard earned money in the name of debt retirement.? It was pleaded that the former Prime Minister? and his family established a Sugar Mill in Kenya which caused great public discontent.? It was also pleaded that the former Prime Minister and his associates did indulge in money laundering at a large scale and acquired four flats in Park Lane, London as also an area of about 400-Acres in Raiwind etc.? The learned Attorney General also contended that the former Prime Minister installed party MNAs and Senators and favourites as heads of statutory bodies like Ehtesab Bureau, Privatization Commission, Board of Investment, PTV, banks, financial institutions, etc. for wrongful gains, which went a long way in further deteriorating the Economic Position.

??238.????? We have gone through the material placed by the Federation on the above issue.? While this Court has already lamented over the decision of the former Prime Minister freezing foreign currency accounts in the case reported as *Federation of Pakistan v. Shaukat Ali Mian* (PLD 1999 S.C. 1026), the fact remains that this step of the deposed Prime Minister shattered the confidence of the overseas Pakistanis, who had deposited their savings in Pakistan in preference to banks abroad for the benefit of the nation. After hearing the learned counsel for the parties and going through the record, we have gathered that the combined effect of the overall policies and methodology adopted by the former government was the total collapse of the country?s economy inasmuch as GDP growth during the past three years had hardly kept pace with the growth of population and Pakistan has a debt burden which equals the country?s entire national income.? We also take judicial notice of the fact that the trade imbalance was persistent and due to defective economic policies and lack of economic discipline by the previous regime, the industrial sector had suffered a great setback.??

?Additionally, this Court never held that the collapse of economy was the only ground for the intervention of Armed Forces.? As a matter of fact, the material relied upon and remarks made by this Court were in response to the assertions made by the petitioners in the their original petitions.?

?14.????????????????? The observations with regard to the principle of joint and ministerial responsibility were made through paragraph No. 243 of the judgment under review after considering the arguments of Ch. Muhammad Farooq alone and repelled on objective assessment of the material placed on record as also in view of the arguments advanced by the parties that the very purpose for which the representative institutions were established under the Constitution stood defeated either directly or indirectly.? We also observed and reiterate here that no one could disagree that we must have democracy and any obstacles in respect of achieving that goal must be overcome.?

?15.????????????????? When the country was faced with a grave crisis, the constitutional maintenance demanded that we interpret the Proclamation and the PCO in such a way as to authorise whatever powers and measures are necessary to cope with the emergency.? Mr. Khalid Anwar, while summarising his arguments at the time of hearing of the Constitutional Petitions, rightly submitted that ?he will not request this Court to do the impossible?.

?16.????????????????? After validating the action of 12<sup>th</sup> October, 1999 on the touchstone of ?doctrine of necessity? we thoroughly considered the question as to whether the Chief Executive should be given the power to amend the Constitution and if so to what extent?? Mr. Khalid Anwar vide paragraph 281 of the judgment under review, ? emphasised that in case the army action is condoned/validated this Court must succinctly state whether the Chief Executive has the power to amend the Constitution and if so, subject to what limitations. He emphasised that in the first instance power to amend the Constitution should not be conceded to the Chief Executive and *Begum Nusrat Bhutto?s case (supra)* should be re-visited. In case this Court follows the dictum of Begum Bhutto?s case (*supra*), the power to amend the Constitution by the Chief Executive must be stated with particularity and the fields which are not to be touched should be specifically stated.?? After thorough consideration, we observed as follows:

????We are of the considered view that if the Parliament cannot alter the basic features of the Constitution, as held by this Court in *Achakzai?s case (supra)*, power to amend the Constitution cannot be conferred on the Chief Executive of the measure larger than that which could be exercised by the Parliament.? Clearly, unbridled powers to amend the Constitution cannot be given to the Chief Executive even during the transitional period even on the touchstone of ?State necessity?..? We have stated in unambiguous terms in the Short Order that the

Constitution of Pakistan is the supreme law of the land and its basic features i.e independence of Judiciary, federalism and parliamentary form of government blended with Islamic Provisions cannot be altered even by the Parliament. Resultantly, the power of the Chief Executive to amend the Constitution is strictly circumscribed by the limitations laid down in the Short Order vide sub-paragraphs (i) to (vii) of paragraph 6.?

?In view of the above categorical stand taken by Mr. Khalid Anwar, this Court laid down the limitations on the power to amend the Constitution as stated above, therefore, learned counsel for the petitioners cannot be allowed to set up a totally new case in these proceedings.

?17.????? ?????????? Put differently, the petitioners cannot be allowed to re-agitate the points in review petitions, which were earlier raised, duly considered and repelled by this Court before it proceeded to validate the Military Action and allow the Chief Executive to amend the constitution subject to stated limitations/conditions for the ordinary orderly running of affairs of the State during the transitory period to advance or promote the good of the people, clearly holding that the constitutional amendments by the Chief Executive can be resorted to only if the Constitution fails to provide a solution for attainment of his declared Objectives.?

?18.????????????????? Regarding time-frame for the restoration of democratic institutions, submissions were made by Mr. Khalid Anwar, Mr. Haleem Pirzada and Mr. S.M. Zafar, *amicus curiae*, which have been recorded in paragraph No. 285 of the judgment under review as follows:

?285.????? Towards the close of his arguments, Mr. Khalid Anwar submitted that this Court should lay down a roadmap with a timetable for the return of constitutional governance.? Mr. Haleem Pirzada, President, Supreme Court Bar Association submitted that 12 months? time from now may be provided to the Armed Forces so that they do the cleansing and go back.? During the course of his arguments, Mr. S.M. Zafar, *amicus curiae* stated that prolonged stay of the Armed Forces in the political arena would damage its professionalism, hence they should retreat to their Barracks as early as possible???

?19.????????????????? It was observed in paragraph No. 43 of the judgment under review, that the reason for granting the period of three years was not merely the preparation of the electoral rolls but many others as pointed out by this Court in paragraph No. 286, wherein it was noticed that besides, ?updating the electoral rolls, time was also required for objections and delimitation process?. The period was granted by this Court after taking into consideration all the relevant factors and practical realities and the same is based on the sound assessment of the attending circumstances.? Reference to the Electoral Rolls Act, 1974 is also irrelevant as it refers to the updating of such rolls only.? As a matter of fact, there are also other factors involved now as, for example, the age limit for voting has been reduced to 18 years from 21 years as a result of which millions of new voters have to be registered by the National Database Registration Authority. Several Federal as well as local authorities are working on this process.?

?20.????????????????? Mr. Sharifuddin Pirzada, learned Senior ASC, appearing on behalf of the Federation, on instructions, in response to the Court?s query makes the following statement:

????????? (i)????????? ?Your lordship has asked about the date of the proposed elections and restoration of the democratic institutions. First, I refer to your lordship?s judgment. How careful your lordships have been. And this is a departure from Nusrat Bhutto?s case.

????????? Paragraph 16 and 17 at page 313 of the above judgment read as under :

?16.????????? That having regard to all the relevant factors involved in the case including the one detailed in paragraphs 14 and 15 above three years period is allowed to the Chief Executive with effect from the date of the Army take-over i.e. 12<sup>th</sup> October, 1999 for achieving his declared objectives.

?17.????????? That the Chief Executive shall appoint a date, not later than 90-days before the expiry of the aforesaid period of three years, for holding of a general election to the National Assembly and the Provincial Assemblies and the Senate of Pakistan.?

????????? (ii)????????? So the date is to be appointed not later than 90 days before the expiry of aforesaid period of three years. Now this was accepted by General Musharraf in the Press Conference on 25.5.2000 at Islamabad, when the Short Order was already announced, relevant portion whereof reads thus:

????????? ?Ans.????????? Timeframe, you see, it is a Supreme Court Decision which we accept in its right spirit.? It is a balanced judgment.? They have given this timeframe according to their own judgment.? And.? as I said we will try our level best to meet this timeframe, and if there occurs any fluctuation then we will see it afterwards.? With our best efforts we will certainly meet the timeframe since this is the decision of the Supreme Court.

????????? ?Q.????????? Will you give us perhaps a ?Yes? or ?No? answer as to whether you will accept the three year?s deadline?

????????? ?Ans.????????? Yes.

????????? ?Q.????????? Will you hand back powers to civilians within three years?

????????? ?Ans.????????? Yes, Obviously, this is the Supreme Court judgement which has to be accepted.?

????????? (iii)????????? The Federal Cabinet on Wednesday last? resolved to complete the government?s agenda, including the establishment of a true democracy within three years as stipulated in the May 12 verdict of the Supreme Court.

?(iv)????????? I take the liberty and seek indulgence to refer to the news item today, an interview was given to Khalij Times wherein General Pervez Musharraf reaffirmed that the schedule will be adhered to.? This has been reproduced in the Daily ?Jang? of today?s issue also.? My Lord so far as the date is concerned, very pertinently you lordship asked the question? but it was reflected in your lordship?s considered judgment and this has been accepted.?

?(v)????????? I have sought the instructions.? Under instructions from the competent authority, I reaffirm the assurances which have been given and which I have read out earlier.??

?21.????????? So far reference to C.P. No. 15/1996 is concerned, it was only occasional and not the basis for granting such time, therefore, the so-called error pointed out in the review petitions, is insignificant and has no bearing on the decision of this case. Needless to observe that emergencies are promulgated all over the world, especially in Asia, Africa and Latin America.? Through the judgment under review we have endeavoured to minimise the continuance of emergency and induced the Government to restore the democratic institutions within the time frame laid down therein, having regard to the peculiar and extra-ordinary circumstances of the case, by providing a solution to meet the exceptional situation prevailing on 12<sup>th</sup> October, 1999.?

?22.????????? There is no error apparent on the face of the record warranting review; the petitioners cannot be allowed under the law to re-agitate and reargue the same points which have already been heard and decided by this Court; some factual controversies have been raised at the Bar which cannot be permitted to be raised under the law; certain fresh material has been filed with the review petitions which existed even prior to the filing of the original petitions and no reason has been advanced as to why the same was not produced with the latter or during the course of hearing of the same, therefore, such material cannot be considered by this Court unless strong reasons are mentioned for its non-production at the relevant time which are lacking.? In any event, fresh documents have no bearing on the conclusion already recorded in the judgment under review leading to validation of action dated 12.10.1999.?

223.???????????????? For detailed reasons to succeed, the petitions are disposed of in terms of the above Short Order.?

44.???????????????? All the points taken by the learned counsel for the petitioners have been dealt with at length after scrutiny of evidence on record and the attending circumstances.? Each and every aspect of the matter now attempted to be re-argued by the learned counsel for the petitioners has been dealt with in the judgment under review as stated above.? This Court stated, in unequivocal terms, that the incident of 12<sup>th</sup> October, 1999 would have led to the creation of dissension and dis-unity in the Armed Forces and endangered the safety and existence of the State itself.? The concept of State Necessity/State survival and avoidance of civil war and the application of the doctrine of State necessity in the instant case have been dealt with at length vide paragraphs-252, 253 to 256 of the judgment under review.? They cannot be reviewed on the pleas raised by the petitioners now.

45.???????????????? We may reiterate by way of emphasis that a bare perusal of the judgment under review shows that adequate answers have been given in relation to all the questions raised by the learned counsel for the petitioners in our well considered findings contained in paragraphs-203 to 286 of the judgment under review.? For facility of reference a summary of the above paragraphs as also reproduction of some of them *in extenso* makes the following reading

#### SUMMARY OF FINDINGS

##### Independence of judiciary and power of judicial review

#### 203.

The basic question, which needs to be resolved is whether the restriction imposed by the PCO I of 1999 on the jurisdiction of this Court does in any way restrict the power of judicial review of this Court whereunder it has an inherent power to interpret any provision of the Constitution or any other legislative instrument or law, even if that particular provision is a provision which seeks to oust the jurisdiction of this Court.

#### 204.

The learned counsel appearing for the parties as well as learned amicus curiae were all one on the point that the legislative instrument promulgated by the Chief Executive are subject to scrutiny by this Court for determination of the present controversy.? However, Mr. Aziz A. Munshi expressed his reservations about the maintainability of the petitions and pleaded ouster of jurisdiction of this Court by means of the Proclamation of Emergency as also the PCO I of 1999.

#### 205.

It was the unanimous stand, endorsed by the Court, that no form of oath taken by or administered to the Judges of the Superior Courts can restrict the judicial power and derogate from the legal position that the Courts, as final arbiters in any constitutional controversy, retain their power and jurisdiction to say as to what a particular provision of the Constitution or the law means or does not mean even if that particular provision is one seeking to oust jurisdiction of the Court.

#### 206.????

The Objectives Resolution (Article 2A) and Declaration of Quaid-i-Azam about democratic set up and social justice envisage independence of judiciary.

#### 207.

Reference to English rendering of? verses 135-36 of Sura Al-Nisa.

#### 208.

Reference to letter sent by Hazrat Umar to Abu Musa Al-ash?ri, Governor/Chief Qazi Basra.

#### 209.

Reference to Beijing Statement of Principles of the Independence of Judiciary.

#### 210.

Analysis of Constitutional provisions regarding independence of judiciary? and the rulings of the Court (Sharaf Faridi, Malik Asad Ali, Al-Jehad Trust, Mehram Ali, Liaquat Hussain)

#### 211.

The Judiciary is entrusted with the responsibility for enforcement of fundamental rights.

#### 212.????????????????

Exclusive power/responsibility of the Judiciary to ensure the sustenance of system of separation of powers based on checks and balances.

#### 213.

Reference by Syed Sharifuddin Pirzada to observations of Chief Justice of Pakistan in the inaugural address to the conference of Board of Directors, Asian Ombudsmen Association.

#### 214.????

Reference to the book ?The Federalist Papers? by Alexander Hamilton-James Madison-John Jay.

#### 215.

Reference to the case of Imtiaz Ahmad (1994 SCMR 2142)

#### 216.

Concept of Judicial power with reference to Mehram Ali?s, Sh. Liaquat Hussain?s cases and William Marbury, ? Spirit of Law?.

#### 217.

Contention of Attorney General that after new Oath, the Judges are bound to defend the PCO, was repelled in the light of Begum Nusrat Bhutto?s case, wherein it was clearly stated that on no principle of necessity could the power of judicial review be taken away.

#### 218.

Reference to the book ?Principles of Revolutionary Legality? by J.M. Eekelaar.

**219.????**

Reference to British Case law (Chief Justice Coke), ?The Evolution of Judicial Power is coterminus with the evolution of civilization and this is because judicial power has to check the arbitrary exercise of powers by any organ or authority?; Scope of PCO vis-?-vis the Constitution; Book titled ?Constitution Legitimacy?.

**220.**

After the Army take-over, the superior Courts retain the power of judicial review.

**INTERVENTION  
BY THE ARMED FORCES**

**221.**

Removal of COAS during his absence from country, appointment of Lt. Gen. Ziauddin, attempt to create dissension among the Armed Forces, criminal conspiracy hatched by the former Prime Minister and others.

**222.**

Reference? to speech of 13<sup>th</sup> October, 1999 made by the Chief Executive; Article by Kamran Khan in the News dated 14.10.1999 titled ?Ambitious Ziauddin Butt steered Nawaz to political disaster.?   
?????????? Intervention validated on the doctrine of state necessity and the principle *salus populi suprema lex*.

**CORRUPTION**

**223.**

Allegations of corruption against the former Prime Minister and his colleagues, disappearance of public faith in the integrity and honesty of the Government which eroded the constitutional and moral authority of the former government, a situation somewhat similar to the one prevalent in July, 1977.

**224.**

Since the government was being run contrary to the provisions of the Constitution, the Armed Forces were compelled to move in as a last resort to prevent any further destabilization.? Reference to Press Clippings regarding defaults etc. Transcript of BBC Television Documentary on Corruption in Pakistan.

**227.**

Reference to debate in the House of Lords on Military intervention in Pakistan.

**228.**

Corruption, absence of good governance are recognized grounds for imposition of Martial Law.

**229.????**

Reference to a study on ?Corruption and Government, Causes, Consequences and Reforms? by Susan Rose Ackerman from Cambridge University.

**230.**

Reference to ?Commonwealth Finance Ministers? Meeting?; Observations in Nawaz Khokhar?s case.

**231.**

Reference to the book ?Money Laundering?

**232.**

Former Government failed to eradicate corruption from the society.

**233.**

Corruption defined.

**234.**

Corruption as a ground for dissolution as discussed in Kh. Ahmad Tariq Rahim, Nawaz Sharif and Benazir Bhutto.

**235.**

The observations made herein and in the Short Order are not intended to condemn *en bloc* the politicians and parliamentarians as a class.? Undoubtedly, there are good, honest and upright as well as corrupt people in every group of persons.? These observations are confined only to the situation which is being attended to in these cases.? Any proceedings commenced against any person including the parliamentarians or politicians or members from the general public under the laws of the country will, no doubt, be decided on their own merits in accordance with law and on the basis of the legally admissible material brought before the concerned fora in those proceedings without being influenced by any observations made in this judgment.? Put differently, it will be only after the finalisation of the proceedings as above that the country will be geared up for resort to democratic principles and corruption-free society which are prerequisite for good governance.? This situation has also been recognized by the Commonwealth Finance Ministers Meeting held on 21-23 September, 1999 at Grand Cayman, Cayman Islands.

???????????????????????? 236.

???????????????????????? The Federation has also alleged that most of the politicians/parliamentarians have misdeclared their assets both before the Wealth Tax Authorities as well as the Election Commission including the former Prime Minister, who admittedly despite owning a helicopter, did not declare the same in his declaration of assets.? It has been pleaded on behalf of the Federation that although misdeclaration of assets was a matter of record, yet the constitutional authorities failed to file references against them before the concerned fora. Thus, all such politicians/parliamentarians through their acts of commission and omission have rendered themselves ineligible for being members of the representative bodies.? In order to substantiate the above allegations, the learned Attorney General has filed voluminous record wherein specific instances of misdeclaration of assets have been given.? We have examined the relevant record only for the purposes of the present controversy and find that sufficient material exists showing, *prima facie*, that a large number of politicians indulged in misdeclaration of assets, which factor has a bearing on the issue in hand.? We may clarify that misdeclaration of assets or any discrepancy as to declaration of assets before the Wealth Tax Authorities qua the Election Commission may not by itself be a ground for intervention of the Armed Forces on 12<sup>th</sup> October, 1999 but this aspect of the matter when viewed in the overall context and with particular reference to the alleged massive corruption and corrupt practices becomes a relevant factor.?

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**COLLAPSE OF ECONOMY**  
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???????????????????? 237.

???????????????????? We now take up another allied issue relating to economic condition of the country. It was alleged on behalf of the Federation that the former Prime Minister and his business associates exported sugar produced in their sugar mills to India by rail and earned millions of rupees as profit.? It was pointed out that several SROs were promulgated by the then government to claim export rebate on sugar and thereby the former Prime Minister and his predecessor committed breach of faith with Pakistani banks/overseas and resident Pakistanis by removing 11 billion dollars lying in their accounts in the banks in Pakistan without their consent and utilized the same for unauthorized purposes, which remain unexplained till today.? It was further stated that the former government froze the FEBC accounts and misappropriated the foreign exchange belonging to resident and non-resident Pakistanis, which not only brought bad name to the Pakistani banks but also to Pakistan as a country and the responsibility of this huge fraud lies heavily on the former Prime Minister.? It was pleaded that this misconduct was further compounded by unlawful transfer of a huge sum of nearly 500 million dollars by the former Prime Minister and his associates between 6.5.1998 to 28.5.1998, to the detriment of the country.? Even after the decision to freeze the foreign currency accounts the former Prime Minister and his associates removed huge amounts of foreign currency after banking hours.? In this process the then Director General, FIA stopped Mr. Mujeeb-ur-Rehman, the brother of Senator Saifur Rehman from removing large amount of foreign exchange in cash at the Islamabad Airport, as a result of which Major General (Retd) Inayatullah Niazi, the Director General, FIA was illegally removed by the former Prime Minister.? Our attention was also drawn to the ?*Qarz Utaro Mulk Sanwaro*? Scheme to demonstrate that it was designed to deprive the Overseas Pakistanis of their hard earned money in the name of debt retirement.? It was pleaded that the former Prime Minister? and his family established a Sugar Mill in Kenya which caused great public discontent.? It was also pleaded that the former Prime Minister and his associates did indulge in money laundering at a large scale and acquired four flats in Park Lane, London as also an area of about 400-Acres in Raiwind etc.? The learned Attorney General also contended that the former Prime Minister installed party MNAs and Senators and favourites as heads of statutory bodies like Ehtesab Bureau, Privatization Commission, Board of Investment, PTV, banks, financial institutions, etc. for wrongful gains, which went a long way in further deteriorating the Economic Position.

???????????????????? 238.

???????????????????? We have gone through the material placed by the Federation on the above issue.? While this Court has already lamented over the decision of the former Prime Minister freezing foreign currency accounts in the case reported as *Federation of Pakistan v. Shaukat Ali Mian* (PLD 1999 S.C. 1026), the fact remains that this step of the deposed Prime Minister shattered the confidence of the overseas Pakistanis, who had deposited their savings in Pakistan in preference to banks abroad for the benefit of the nation. After hearing the learned counsel for the parties and going through the record, we have gathered that the combined effect of the overall policies and methodology adopted by the former government was the total collapse of the country?s economy inasmuch as GDP growth during the past three years had hardly kept pace with the growth of population and Pakistan has a debt burden which equals the country?s entire national income.? We also take judicial notice of the fact that the trade imbalance was persistent and due to defective economic policies and lack of economic discipline by the previous regime, the industrial sector had suffered a great setback.?

**?? ROLE OF PUBLIC REPRESENTATIVES**

???????????????????? 239.

???????????????????? We now advert to the plea raised by Mr. Khalid Anwar on behalf of the petitioners that various allegations of mismanagement, corruption and even hijacking (though *sub judice*), levelled against Mian Nawaz Sharif, the former Prime Minister, who is not even a petitioner herein do not justify that the Constitution should be condemned and the popularly elected bodies should be disbanded.?? The learned Attorney General submitted that the petitioners were not entitled to seek relief of restoration of the former government, the Parliament and the Provincial Assemblies because such reliefs were being sought to perpetuate dictatorship and misgovernance in the country by the former Prime Minister and his associates in that there were no checks and balances on the exercise of power by them.? He further submitted that the Parliament had been reduced to a mere rubber-stamp, inasmuch as, whenever it assembled it had hardly the requisite quorum and thus, failed to function and discharge its constitutional duties of legislation and were being used as instruments to establish despotism at the whims and caprices of the former Prime Minister.? He submitted that the government was being run through Ordinances though some of which had lapsed.? Even when some Bills were moved before the National Assembly or the Senate, they were hurriedly passed without proper debate about its pros and cons.? The learned Attorney General submitted that the Provincial Assemblies equally failed to discharge their constitutional duties and obligations.? He submitted that in reality all the parliamentarians, the Chief Ministers of the Provinces and the Members of the Provincial Assemblies were either associates and cronies of the former Prime Minister or had become too helpless and ineffective to perform their functions in accordance with the dictates of the Constitution, the law and their conscience and were not in a position to object to any action, which had the blessings of the former Prime Minister.? He submitted that democratic norms and polity require that government should be run by responsible and honest representatives of the people, who should be able to steer the governance of the country whereby the mandate of the people within the limits of the Constitution could be accomplished.? The learned Attorney General further submitted that the representatives of the people plundered the public wealth, acted irresponsibly and were nothing but privy to the one man rule in the country.? The learned Attorney General relied on an interview of Mr. Khalid Anwar, former law minister, given to the media, published in Daily Khabrain dated 25-3-2000 wherein he observed:

He also referred to an interview of Mr. Majeed Nizami, Chief Editor of the Daily ?Nawa-e-Waqt? and ?The Nation?? given to Pakistan Digest, published in the Daily Nawa-e-Waqt, Rawalpindi, dated 30-4-2000 wherein he stated:

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While substantiating the above allegations against the members of the former government, the learned Attorney General contended that the actions of the former government were not in conformity with the maintenance of sovereignty, integrity, well being and prosperity of Pakistan because when the Chief of Army Staff was attempted to be handed over to an enemy country and he was exposed to physical annihilation and further when it tried to create

dissension in the ranks of the Armed Forces, it was not safeguarding or maintaining the sovereignty of Pakistan, rather the sovereignty and integrity of the country were seriously endangered because it is the only institution, which is capable of safeguarding the integrity of Pakistan.? On the question of well-being, the learned Attorney General stated that the well being of the people is a reflection of the combined effect of sovereignty, integrity and solidarity and there can be no well being without either of sovereignty, integrity, solidarity and prosperity.? Likewise, prosperity again embodies all these ingredients and also extends to the economic prosperity of the people of Pakistan.

**240.**

The Court is faced with a situation not visualized by the Constitution. The purposes for which the representative institutions were established stand defeated directly or indirectly.

**241.**

Democracy defined; requisites of democracy.

**242.**

Figures of past five general elections.

**243.**

Suspension of representative bodies validated on the ground of state necessity in view of joint and ministerial responsibility in a parliamentary system.

#### **CHECKS AND BALANCES/ ARTICLE 58(2)(b).**

**244.**

After deletion of 58(2)(b) checks and balances were removed and the balance of power disturbed.

**245.**

Reference to suggestions by Justice Hamoodur Rehman regarding amendment of the Constitution in respect of powers of the President, ?Power?, it is said, ?corrupts and absolute power corrupts absolutely?.

**246.**

Reference to Article 260 of the Draft Constitution of 1971 retaining the power of imposing Martial Law.

**247.**

References to the case of Mehmood Khan Achakzai.

**248.**

Reference to the British Constitution and in particular to the code of conduct for the Ministers framed by Britain; the book titled ?The Hidden Wiring?; the book ?Arthur Berriedale Keith?; the book ?The English Constitution?.

???????????????????????? 249.

???????????????????????? After careful analysis of the above material, we are of the view that it is never safe to confer unfettered powers on a person who is holding the reins of the affairs of the country as is embedded in the saying, ?power corrupts and absolute power corrupts absolutely??. Accordingly, while upholding the judgment in *Mehmood Achakzai's case (supra)* we would like to observe that probably the situation could have been avoided if checks and balances governing the powers of the President and the Prime Minister had been in the field by means of Article 58(2)(b).

#### **RIDICULING THE JUDICIARY**

**250.**

Disparaging remarks against the judiciary crossed all limits with the rendering of judgment in Sh. Liaquat Hussain.

**251.????**

The decision in Sh. Liaquat Hussain was treated as a stumbling block and tapping of telephones and eavesdropping were resorted to.

#### **???????? DOCTRINE OF STATE NECESSITY**

**252.**

After perusing the voluminous record and after considering the submissions made by the parties, we are of the view that the machinery of the government at the Centre and the Provinces had completely broken down and the Constitution had been rendered unworkable. A situation arose for which the Constitution provided no solution and the Armed Forces had to intervene to save the State from further chaos, for maintenance of peace and order, economic stability, justice and good governance and to safeguard integrity and sovereignty of the country dictated by highest considerations of State necessity and welfare of the people.? The impugned action was spontaneously welcomed by all sections of the society.

**253.**

Doctrine of State necessity examined in the light of Nusrat Bhutto's and Liaquat Hussain's cases. Here, the Court is faced with an extra constitutional situation and all the elements described by this Court viz. inevitable necessity, exceptional circumstances, no other remedy to apply, measure taken must be proportionate to the necessity which must be of temporary character, limited to the duration of exceptional circumstances, are present inasmuch as the Constitution provided no solution to meet the extraordinary situation prevailing on 12<sup>th</sup> October, 1999.

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**254.**

As to the plea raised by Mr. Khalid Anwar that the ?doctrine of necessity? is accepted as a defence in criminal prosecution and tortious acts which concept is different from that of ?State necessity?, suffice it to say that this Court in the case of *Begum Nusrat Bhutto (supra)* approved the ?doctrine of State necessity? and laid down the conditions precedent for invoking the same.? Therefore, the distinction pointed out by Mr. Khalid Anwar regarding the concept of ?doctrine of necessity? and that of ?State necessity? is immaterial.? The fact remains that this Court is of the considered view that intervention by the Armed Forces on 12<sup>th</sup> October, 1999 was an imperative and inevitable necessity in view of the exceptional circumstances prevailing at that time and, therefore, there is no valid justification for not validating the extra constitutional measure of the Armed Forces on the technical distinction between ?doctrine of necessity? and the ?doctrine of State necessity?.

I.??? ?More serious is the question whether the law of non-resistance should bind us in case of extreme and imminent peril. Even some laws of God, although stated in general terms, carry a tacit exception in case of extreme necessity. Such a limitation was put upon the law of the Sabbath by learned men in the time of the Maccabees; hence the well-known saying: ?Danger to life breaks the Sabbath.? In Synesius, again, a Jew presents this excuse for having violated the law of the Sabbath: ?We were exposed to imminent danger of death.? ?This exception was approved by Christ, as also an exception in the case of another law, which forbade the eating of shewbread. The Jewish rabbis, in accordance with an ancient tradition, admit a similar exception in the case of the law forbidding the use of certain articles of food, and in some other cases; and rightly so. This does not mean that God has not the right to oblige us to submit ourselves to certain death; it does mean that since there are some laws of such a nature, we are not to believe that they were given with so inflexible an intent. The same principle holds even more manifestly in the case of human laws.?

?Now this law which we are discussing?the law of non-resistance?seems to draw its validity from the will of those who associate themselves together in the first place to form a civil society; from the same source, furthermore, derives the right which passes into the hands of those who govern. If these men could be asked whether they purposed to impose upon all persons the obligation to prefer death rather than under any circumstances to take up arms in order to ward off the violence of those having superior authority, I do not know whether they would answer in the affirmative, unless, perhaps, with this qualification, in case resistance could not be made without a very great disturbance in the state, and without the destruction of a great many innocent people. I do not doubt that to human law also there can be applied what love under such circumstances would commend.?

24.? Barclay, though a very staunch advocate of kingly authority, nevertheless comes down to this point, that he concedes to the people, and to a notable portion of the people, the right of self-defence against atrocious cruelty, despite the fact that he admits that the entire people is subject to the king. I readily understand that in proportion as that which is preserved is of greater importance, the equity of admitting an exception to the letter of a law is increased.? But on the other hand I should hardly dare indiscriminately to condemn either individuals, or a minority which at length availed itself of the last resource of necessity in such a way as meanwhile not to abandon consideration of the common good.??????????

?First, then, if rulers responsible to the people, whether such power was conferred at the beginning or under a later arrangement as at Sparta?if such rulers transgress against the laws and the state, not only can they be resisted by force, but, in case of necessity, they can be punished with death. An example is the case of Pausanias, king of the Lacedaemonians. And since the earliest kingships of Italy were of this character, it is surprising that, after narrating the exceedingly dreadful crimes of Mezentius, Virgil adds:

???????????????????? They for their king.?

¶1.2? Now let us see whether men in general possess any right over things which have already become the property of another. Some perchance may think it strange that this question should be raised, since the right of private ownership seems completely to have absorbed the right which had its origin in a state of community of property. Such, however, is not the case. We must, in fact, consider what the intention was of those who first introduced individual ownership; and we are forced to believe that it was their intention to depart as little as possible from natural equity. For as in this sense even written laws are to be interpreted, much more should such a point of view prevail in the interpretation of usages which are not held to exact statement by the limitations of a written form?

23.? Hence it follows, again, that on a voyage, if provisions fail, whatever each person has ought to be contributed to the common stock. Thus, again, if fire has broken out, in order to protect a building belonging to me I can destroy a building of my neighbour. I can, furthermore, cut the ropes or nets in which my ship has been caught, if it cannot otherwise be freed. None of these rules was introduced by the civil law, but they have all come into existence through interpretations of it.?

?The reason which lies back of this principle is not, as some allege, that the owner of a thing is bound by the rule of love to give to him who lacks; it is, rather, that all things seem to have been distributed to individual owners with a benign reservation in favour of the primitive right. For it those who made the original distribution had been asked what they thought about this matter they would have given the same answer that we do. ?Necessity,? says Seneca the father, ?the great resource of human weakness, breaks every law, meaning, of course, human law, or law constituted after the fashion of human law. Cicero in his eleventh *Philippic* averred; ?Cassius has set out for Syria, a province belonging to another, if men observed written laws; but since these have been suppressed, it becomes his province by the law of nature.? In Curtius we read: ?In a common disaster each man has whatever falls to his lot.?

***?That the right, in case of necessity, to use things belonging to others, holds when the necessity is in no way avoidable.***

?Administrations, however, must be kept in mind, that this permission to use property belonging to another may not be carried beyond proper limits.?

?The first is, that every effort should be made to see whether the necessity can be avoided in any other way, as, for example, by appealing to a magistrate, or even by trying through entreaties to obtain the use of the thing from the owner. Plato authorizes the taking of water from a neighbour's well only in case one in search of water has dug on his own land clear to the underlying stratum of chalk. Solon gives such authorization only in case one has dug on his own land to a depth of forty cubits; in regard to Solon's rule Plutarch adds: ?He thought to minister to need, not to show indulgence to laziness.? In his answer to the people of Sinope Xenophon said: ?Wherever the right to purchase is not granted to us, whether on Greek or on barbarian soil, we take what we have need of, not from lawlessness but from necessity.?

***?That the right, in case of necessity, to use things belonging to another, holds except when the possessor has equal need.***

?In the second place, this right cannot be conceded if the owner himself is under an equal necessity; for in like circumstances the position of the owner gives him the preference. ?He is not foolish?, says Lactantius, ?who has not, even for his own safety, pushed a shipwrecked man from his plank, or a wounded man from his horse; for he has kept himself from the inflicting of an injury, which would be a sin; and to avoid such a sin is wisdom.?? Cicero had said in his third book *On Duties*: ?should not the wise man, therefore, if he is exhausted with hunger, take food away from another man who is of no account? By no means. For my life is no more precious to me than the possession of such a spirit that I would not harm any one for the sake of my own advantage? In Curtius we read: ?The man who will not part with his own has a better case than the man who demands what belongs to another.?

***?That there is, further, an obligation to restore the things of another used in case of necessity, whenever restoration shall be possible***

?In the third place, restitution of another's property which has been used in case of necessity must be made whenever this can be done.?

?There are some who hold a different opinion. Their plea is, that the man who has availed himself of his own right is not bound to make restitution. But it is nearer the truth to say, that the right here was not absolute, but was restricted by the burden of making restitution, where necessity allowed. Such a right is adequate to maintain natural equity against any hardship occasioned by private ownership.?

***?Application of this right in the case of wars.***

?From what has been said we can understand how it is permissible for one who is waging a just war to take possession of a place situated in a country free from hostilities. Such procedure, of course, implies these conditions, that there is not an imaginary but a real danger that the enemy will seize the place and cause irreparable damage; further, that nothing be taken except what is necessary for protection, such as the mere guarding of the place, the legal jurisdiction and revenues being left to the rightful owner; and, finally, that possession be had with the intention of restoring the place as soon as the necessity has ceased.?

?Henna was retained by an act either culpable, or justified by necessity,? says Livy; for whatever departs in the least degree from necessity is culpable. When the Greeks who were with Xenophon were in pressing need of ships, on the advice of Xenophon himself they seized the vessels that were passing by, yet took possession in such a way that they kept the cargoes unharmed for the owners, furnished provisions also to the sailors, and paid passage money.?

?The first right then that, since the establishment of private ownership, still remains over from the old community of property, that which we have called the right of necessity.?

***?That men possess the right to use things which have become the property of another, for a purpose which involves no detriment to the owner.***

?A second right is that of innocent use.

?Why,? says Cicero, ?when a man can do so without loss to himself, should he not share with another things that are useful to the recipient and can be spared without annoyance to the give?? Thus Seneca declares that opportunity to get a light for a fire is not to be considered a favour. In Plutarch we read the following, in the seventh book of his *symposiasts*: ?It is not right for us to destroy food, when we ourselves have more than enough; or to stop up or conceal a spring, when we have drunk all we wanted; or to obliterate the signs which mark the route for ships, or signs on land which have been useful to us.?

***?Hence the right to the use of running water.***

?Thus a river, viewed as a stream, is the property of the people through whose territory it flows, or of the ruler under whose sway that people is. It is permissible for the people or king to run a pier out into it, and to them all things produced in the river belong. But the same river, viewed as running water, has remained common property, so that any one may drink or draw water from it.?

Who would forbid from lighted torch a light

To take, and guarded hold in hollow sea

The waters vast?

Says Ovid.? In the same author Latona thus addresses the Lycians:

Why water me deny? Common to all. The use of water is.

?There also he calls the waves a public blessing, that is a blessing common to mankind, using a less appropriate meaning of the word ?public?. In that sense certain things are said to be public by the law of nations; and with this meaning Virgil referred to the wave as open to all men.?

## 256.

In the book titled *A Treatise On The Law Of The Prerogative Of The Crown* and the *Relative Duties and Rights of the Subject* by Joseph Chitty, it was observed:

?There are indeed two memorable instances on record, in which Parliament have assembled without the authority of the King; and have, when so assembled, effected most momentous revolutions in the government. I allude to the Parliament which restored Charles 2; and the Parliament of 1688 which disposed of the British Crown to William III. But in both these instances the necessity of the case rendered it necessary for the Parliament to meet as they did, there being no King to call them together, and necessity supersedes all law. Nor is it an exception to this rule, that by some modern statutes (b) on the demise of the King or

Queen (which at common law dissolved the Parliament, because it could no longer consult with him who called it) (c), the Parliament then in being or otherwise the last Parliament shall revive or sit, and continue for six months after such demise, unless sooner prorogued or dissolved by the successor; that is, if the Parliament be at

the time of the King's death separated by adjournment or prorogation, it shall notwithstanding assemble immediately; or, if no parliament be then in being, the members of the last Parliament shall assemble and be again a Parliament. For in such case, the revived Parliament must have been originally summoned by the Crown.

**257.**

Reference to the case concerning 'The Gabčíkovo-Nagymaros Project' decided by International Court of Justice.

**258.**

Necessity defined in *Corpus Juris Secundum*.

**259.**

Reference to 'Constitutional and Administrative Law' by de Smith.

**260.**

Reference to the case from Lesotho.

**261.**

Reference to the case of Mustafa Ibrahim

**262.**

Reference to the case of Mitchell and others quoted by Justice Munir.

**263.**

Emergencies are promulgated all over the World especially in Asia, Africa and Latin America but there has been an effort to minimize them and induce the authorities concerned to respect the fundamental rights; Reference to the book titled 'States of Emergency'.

**264.**

Reference to the book titled 'From Military to Civilian Rule'

**265.**

Reference to the Book titled Democracy, the Rule of Law and Islam.

**266.**

It will be seen that the 'doctrine of necessity' is not restricted to criminal prosecution alone. However, the invocation of the doctrine of State necessity depends upon the peculiar and extraordinary facts and circumstances of a particular situation. It is for the Superior Courts alone to decide whether any given peculiar and extraordinary circumstance warrant the application of the above doctrine or not. This dependence has a direct nexus with what preceded the action itself. The material available on record generally will be treated at par with the 'necessity/State necessity/continuity of State' for the purposes of attaining the proportions justifying its own scope as also the future and expected course of action leading to restoration of democracy. It was in this context that the arguments were addressed on behalf of the petitioners, except Mr. Shahid Orakzai, Syed Iqbal Haider and Mr. Habib-ul-Wahab-ul-Khairi to the effect that only the ex-Prime Minister was responsible for the present situation. However, what meets the eye is that all the Parliamentarians, the Chief Ministers of the Provinces and the Members of the Provincial Assemblies were not in a position to object to any action, which had the blessings of the former Prime Minister.

### DE FACTO DOCTRINE

**267.**

Survey of the case law on the subject. Initially the status of the present Government was *de facto* but in view of the validation, it has attained *de jure* status.

### **??????????? VALIDATION OF THE PROCLAMATION, ??????????? PCO 1/99 & ORDER 1 OF 2000.**

**268.**

The validity of the Proclamation dated 14<sup>th</sup> October, 1999 and other succeeding documents falling in the same category depends upon a tentative assessment of the situation to be made with a view to giving effect to the attending circumstances. It is common ground between the petitioners, who have appeared in person, the learned counsel appearing on behalf of some of the petitioners, Syed Sharifuddin Pirzada, learned Sr. ASC, as well as the learned Attorney General for Pakistan appearing on behalf of the Federation, Dr. Farooq Hasan, appearing on behalf of the Lahore High Court Bar Association as also Mr. S.M. Zafar, learned Sr.ASC appearing as *amicus curiae*, that the situation created and/or which preceded the Proclamation dated 12<sup>th</sup> October, 1999 is the basis for the extra-constitutional measure. However, M/S Shahid Orakzai and Syed Iqbal Haider were of the view that the Proclamation and the other instruments issued by the Chief Executive are in accordance with the Constitution. It is not necessary to deal with the latter contention of M/S Orakzai and Syed Iqbal Haider, which is *ex facie* untenable. Mr. Khairi's contention was that the Proclamation to the extent it impinges on the independence of Judiciary is not valid. We are also inclined to the same view.

**269.**

It was argued that the Proclamation and the entire super structure thereon is outside the contemplation of the Constitution.

**270.**

There is no cavil with the proposition advanced by Ch. Muhammad Farooq regarding the constitutional position as also the role of the Army and the functions which the Armed Forces, the Prime Minister and Parliament/Assemblies perform under the Constitution. Be that as it may, admittedly the impugned action has not been taken under any constitutional provision, but is the result of an extra-constitutional measure and therefore reference to the above constitutional provisions is of no consequence. The sole question for consideration is whether the extra-constitutional measure taken by the Armed Forces could be validated on any ground or not. Recognition of a situation of whatever magnitude does call for remedial measures to be considered/contemplated with a view to purging the situation on the ground. All that is required to be considered is that the action should have a nexus with the facts on the ground. Such consideration can be undertaken only by the Superior Courts in the exercise of

their powers under Articles 199 and 184 of the Constitution. It is the duty of the Superior Courts that they recognize the evil, suggest remedial measures therefor and lay down infrastructure for a journey leading to the restoration of the democratic processes/institutions as expeditiously as possible. If those responsible for achieving these objectives fall short of the measure within the contemplation of the law during their tenures respectively, then the remedy lies in identifying the facts on the ground and taking remedial measures to suppress the evil.? The action of 12<sup>th</sup> October, 1999 being what it is, qualifies for validation on the ground of State necessity/survival.? It is for the representatives of the people to see to it that everything is in order and no body can raise his little finger when their actions are in line with the fundamentals of the Constitution.? No rule except that by the representatives of the people within the contemplation of the Constitution and the law has the support of the Superior Judiciary.? We are firmly committed to the governance of the country by the people's representatives and we reiterate the definition of the term 'democracy' to the effect that 'it is government of the people, by the people and for the people' and not by the Army rule for an indefinite period.? It has already been emphasized in the Short Order that prolonged involvement of the Army in civil affairs runs a grave risk of politicizing it, which would not be in national interest and that civilian rule in the country must be restored? within the shortest possible time after achieving the declared objectives as reflected in the speeches of the Chief Executive dated 13<sup>th</sup> and 17<sup>th</sup> October, 1999, which necessitated the military takeover.

**271.**

The representatives of the people were accused of corruption and failed to establish good governance. The process of accountability carried out by the former government was shady as it was directed against the political rivals. All institutions including judiciary were being systematically destroyed in pursuit of self serving policies and the democratic institutions were not functioning in accordance with the Constitution.

**272.**

Had the former Prime Minister been successful in his designs, there would have been chaos and anarchy rather a situation of civil war where some factions of the Armed Forces were fighting against others.

**273.**

Reference by Shahid Orakzai to Articles 46, 48, 90 and 99 is irrelevant, which do not provide a solution to an extra constitutional situation.

### **IMPORT OF THE TERM ?CHIEF EXECUTIVE?**

**274.**

While running the affairs of the country, as nearly as may be, in accordance with the Constitution, General Musharraf is practically performing the functions of Prime Minister, he holds the position of Chief Executive in the scheme of the Constitution.

**275.**

After having validated the action of 12<sup>th</sup> October, 1999 on the touchstone of the doctrine of State necessity, it is necessary to consider the next very important and allied question as to whether the Chief Executive should be given the power to amend the Constitution and if so, to what extent?? We have taken pains to examine the pros and cons of this issue, which is definitely of far reaching consequences.? Mr. Khalid Anwar vehemently opposed the conferment of such a power on the Chief Executive on the ground that it is opposed to the doctrine of separation of powers, which has evolved through the history of civilization.? He submitted that all men, be they wise such as Socrates, the most knowledgeable such as Aristotle and the most virtuous such as Imam Abu Hanifa, need be subject to the limits of checks and balances to prevent tyranny.? He submitted that the Chief Executive himself has pledged to preserve the Constitution, inasmuch as it is the case of the Government itself that they have not proclaimed Martial Law and only Emergency has been proclaimed for a transitional period to save the system and thus the Court should restrict him within the legal/constitutional limits.

**276-277,279.**

Distinction between coup d'etat and revolution was drawn by Mr. S.M. Zafar with reference to the nature of powers that may be conferred on the incumbent in presenti.? Present change of government, being in the nature of coup d'etat and not revolution, minimum and limited powers to run the affairs of the state should be conceded to the Chief Executive for the transitional period to enable him to restore the democratic process in the country at the earliest.

**278.**

Mr.S.M.Zafar has tried to distinguish between *coup d'etat* and revolution with reference to the nature of powers that may be conferred on the incumbent *in presenti*. ?He was of the view that the present change of government in the country was in the nature of *coup d'etat* and not revolution and, therefore, minimum and limited powers to run the affairs of the state should be conceded to the Chief Executive for the transitional period to enable him to restore the democratic process in the country at the earliest. In the context of the submission made by Mr.S.M.Zafar reference may be made to a leading work on ***Revolution and Political Change*** by C. Welch & Bunker Taintor, who say : ? Revolution involves the rapid tearing down of existing political institutions and building them anew? on different foundations. *On Revolutions*, by H. Arendt it is said:

?Coups d'etat and palace revolutions, where power changes from one man to another, from one clique to another, depending upon on the form of government in which the *coup d'etat* occurs have been less feared because of the change they bring about is circumscribed to the sphere of Government itself and carries a minimum of uneasiness to the people at large?

**280.**

The above distinction is hyper technical and the two terms, in the context of the present case, are interchangeable and nothing substantial would turn on considering the same from one angle or another.

**281.**

After considering the pros and cons of the question of grant of power to amend, in the light of the opposing stances taken by the learned counsel for the parties, the Court reiterated that the Constitution of Pakistan is the supreme law of the land and its basic features i.e. independence of judiciary, federalism and parliamentary form of government blended with Islamic Provisions can not be altered even by the Parliament.

**281.**

The question arises whether the Chief Executive can be granted unfettered powers to amend the Constitution.? Mr. Khalid Anwar emphasised that in case the Army action is condoned/validated this Court must succinctly state

whether the Chief Executive has power to amend the Constitution and if so, subject to what limitations. He emphasised that in the first instance power to amend the Constitution should not be conceded to the Chief Executive and *Begum Nusrat Bhutto's case (supra)* should be re-visited. In case this Court follows the dictum of Begum Bhutto's case (*supra*), the power to amend the Constitution by the Chief Executive must be stated with particularity and the fields which are not to be touched should be specifically stated.? Mr. S. Sharifuddin Pirzada? argued that once the Army action through extra-constitutional measure is validated, the Chief Executive should be given the power to amend the Constitution. Same view was expressed by the learned Attorney General and Dr. Farooq Hassan.? We are of the considered view that if the Parliament cannot alter the basic features of the Constitution, as held by this Court in Achakzai's case (*supra*), power to amend the Constitution cannot be conferred on the Chief Executive of the measure larger than that which could be exercised by the Parliament.? Clearly, unbridled powers to amend the Constitution cannot be given to the Chief Executive even during the transitional period even on the touchstone of ?State necessity?..? We have stated in unambiguous terms in the Short Order that the Constitution of Pakistan is the supreme law of the land and its basic features i.e independence of Judiciary, federalism and parliamentary form of government blended with Islamic Provisions cannot be altered even by the Parliament. Resultantly, the power of the Chief Executive to amend the Constitution is strictly circumscribed by the limitations laid down in the Short Order vide sub-paragraphs (i) to (vii) of paragraph 6.

???????????????????? 282.

???????????????????? We have held in the Short Order that the cases of learned former Chief Justice and Judges of the Supreme Court, who had not taken oath under the Oath of Office (Judges) Order, 2000 (Order 1 of 2000), and those Judges of the Lahore High Court, High Court of Sindh and Peshawar High Court, who were not given oath, cannot be reopened, being hit by the doctrine of past and closed transaction.

???????????????????? 283.

???????????????????? The practical effect of the above observation is that the action of the Chief Executive in this behalf has been validated. It is a well-settled principle that in such situations the Court may refuse relief in respect of a particular decision, but go on to determine the general question of law or interpretation that the case raises. Clearly, the Judges of the Superior Judiciary enjoy constitutional guarantee against arbitrary removal.? They can be removed only by following the procedure laid down in Article 209 of the Constitution by filing an appropriate reference before the Supreme Judicial Council and not otherwise. ?? The validity of the action of the Chief Executive was open to question on the touchstone of Article 209 of the Constitution. But none of the Judges took any remedial steps and accepted pension as also the right to practice law and thereby acquiesced in the action. Furthermore, the appropriate course of action for this Court in these proceedings would be to declare the law to avoid the recurrence in future, but not to upset earlier actions or decisions taken in this behalf by the Chief Executive, these being past and closed transactions. The principle is well-settled? that the Courts can refuse relief in individual cases even though the action is flawed, depending upon the facts and circumstances of each case.? The action of Chief Executive in the context given above has not encroached on the judicial power or impaired it in the process. However, the observations made herein as to the declaration of law under Article 209 of the Constitution would not entitle the relevant authorities or this Court to reopen the cases of the above Judges which have become final. On the question of legislative power in relation to Court's declaration of law, the matter stands concluded by the judgment of this Court in *Muhammad Yusuf v. The Chief Settlement and Rehabilitation Commissioner Pakistan, Lahore and another* (PLD 1968 SC 101) in the following terms:

???? ?This judgment was delivered on the 2<sup>nd</sup> November 1964, and its consequence was that as from that date all Courts subordinate to the Supreme Court and all executive and quasi-judicial authorities were obliged by virtue of the Constitution to apply the rule as laid down by the Supreme Court in cases coming up before them for decision. It did not have, and it cannot be contended that it had, the effect of altering the law as from the commencement of the Act so as to render void of its own force all relevant orders of the Settlement Authorities or of the High Court made in the light of the earlier interpretation which was that the exercise of the delegated power was subject to the provisions in Chapter VI of the Act.?

284.

We, therefore, declare that the Judges of the Supreme Court and High Courts cannot be removed without resorting to the procedure prescribed in Article 209 of the Constitution, but the cases of Judges who ceased to be Judges of the Supreme Court and High Courts by virtue of Oath of Office (Judges) Order, 2000 (Order 1 of 2000) are hit by the doctrine of past and closed transaction and cannot be reopened.

285.

Towards the close of his arguments, Mr. Khalid Anwar submitted that this Court should lay down a roadmap with a timetable for the return of constitutional governance.? Mr. Haleem Pirzada, President, Supreme Court Bar Association submitted that 12 months? time from now may be provided to the Armed Forces so that they do the cleansing and go back.? During the course of his arguments, Mr. S.M. Zafar, *amicus curiae* stated that prolonged stay of the Armed Forces in the political arena would damage its professionalism, hence they should retreat to their Barracks as early as possible.? On this issue, the learned Attorney General made the following statement:

?That the Federation intends to restore true representative democracy in the country as early as possible.? It is however not possible to give specific timeframe for the above among others for the reasons that the authorities/Government require time for:

a) ?????? Revival of country's economy, which stands ruined, as submitted before this Court;

b) ?????? Completion of the process of accountability;

c) ?????? Recovery of huge plundered national wealth including bank loans running into billions of rupees and foreign exchange abroad worth billions of US dollars;

d) ?????? The task of unavoidable electoral reforms including preparation of fresh electoral rolls;

e) ?????? Ensuring harmonious and efficient working of the important organs of the State, stable and good governance including maintenance of law and order, to prevent abuse of power, and to ensure and safeguard smooth functioning and enjoyment of democracy by the people.?

286.

We are not in favour of an Army rule in preference to a democratic rule. There were, however, evils of grave magnitude with the effect that the civilian governments could not continue to run the affairs of the country in the face of complete breakdown. The remedy to the said evil was the holding of fair and impartial elections by the Chief Election Commissioner at the earliest possible time, but the same could not be achieved till the electoral rolls are updated. Ordinarily, we would have allowed minimum time for holding of fresh elections as contemplated under the Constitution, but the learned Attorney General made a statement at the Bar that as per report of the Chief Election Commissioner, updating of the electoral rolls could not be done before two years and thereafter objections and delimitation process etc. were to be attended to. Mr.Sartaj Aziz, Senator, and the M.Q.M. in their respective petitions Nos.15 and 53 of 1996 had also taken the stand that in the absence of proper and authentic electoral rolls, millions of people will be disenfranchised. This statement of the learned Attorney General was not rebutted. This being so, there





